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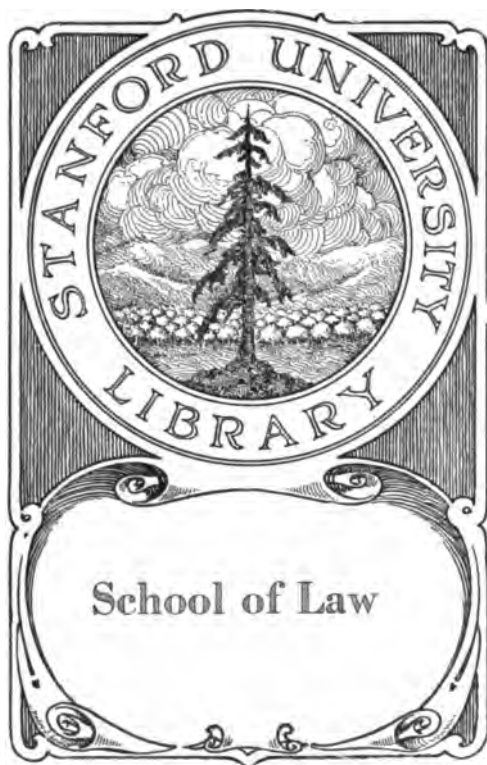
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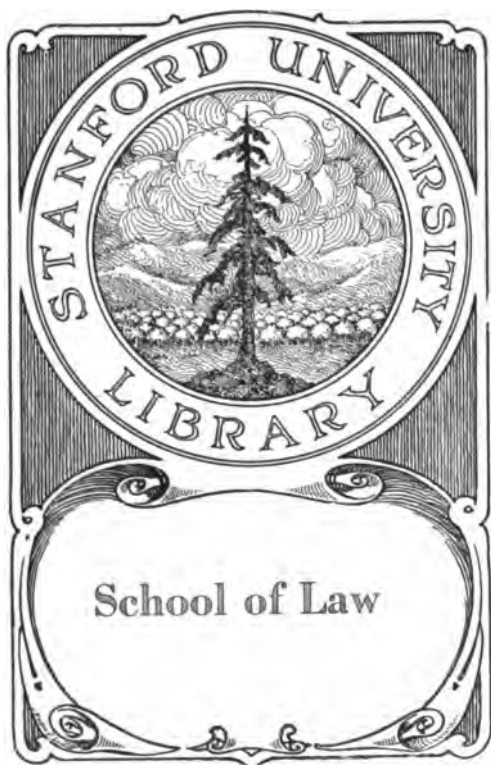
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DIARY FOR JANUARY.

1. Thur..New Year's day.
2. Frid ..Christmas Vacation in Court of Appeal ends.
4. Sun. ..Second Sunday after Christmas.
5. Mon. ..Heir and Dev. Sitt. and County Court Term begin. Municipal Elections held.
6. Tuea..Toronto and Hamilton Assizes. Christmas Vacation in Chancery ends.
8. Thur..Christmas Vacation in Exchequer Court ends.
10. Sat. ..Christmas Vacation in Supreme Court ends. County Court Terms end.
11. Sun. ...First Sunday after Epiphany.
12. Mon....Sir Chas. Bagot, Gov.-Gen., 1842.
13. Tuea...Court of Appeal sittings begin.
13. Sun. ...Second Sunday after Epiphany.
19. Mon..First meeting Municipal Councils, exclusive County Councils.
20. Tuea..Heir and Dev. Sittings end. First meeting County Councils.
25. Sun. ...Septuagesima Sunday.

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Canada Law Journal.

Toronto, January, 1880.

A second number will be issued in the middle of this month to give our readers the result of the judgments recently delivered.

The Supreme Court of the United States is said to be more than three years in arrears. Although during the recent term 379 cases were disposed of, there yet remain to be heard 1150.

The following gentlemen have been appointed Examiners in Law under the recent resolution of the Law Society: Thomas Hodgins, Esq., Q.C., Equity Jurisprudence; T. D. Delamere, Esq., Commercial Law; J. S. Ewart, Esq., Real Property; J. E. McDougall, Esq., Criminal Law, Maritime Law, &c.

The Court of Appeal in England has recently decided that a married woman cannot be made bankrupt, even though she has separate property. The Court puts it on the ground that she is not liable to be sued as a *debtor*, properly so called, but her engagement has made her separate estate liable to satisfy that engagement: *Ex p. Jones*, 23 Sol. J. 75.

There is the most urgent necessity for the appointment of a strong judge to the vacancy still remaining on the Manitoba Bench. We all know what the Chief Justice is. The recent appointment (Mr Debuc), though giving high character and integrity to the bench, does not add much, we understand, to its judicial ability. The requisition made by the Manitoba bar for the appointment of Mr. Dalton to the third place, shows their view of the situation, and while we think

STRANGER TO CONTRACT ENFORCING IT.

it out of the question, to expect any move on the part of the Government to appoint Mr. Dalton, or any desire on his part to change his work and residence; yet we quite appreciate the wish of the Manitoba Bar to have such an able, upright lawyer placed on the prairie bench.

STRANGER TO CONTRACT ENFORCING IT.

The law has undergone remarkable changes upon the rights of one who is a stranger to a contract, which contains a clause for his benefit, to enforce such a contract. At one time the preponderance of opinion was plainly in favour of the proposition, that if one person made a promise to another for the benefit of a third, that third might maintain an action upon it. This, indeed, is the very language of Mr. Justice Buller, in *Marchington v. Vernon*, 1 B. & P., 101 (*in notis*). The same was the opinion of Eyre C. J., as expressed in *The Company of Felmakers v. Davis*, 1 B. & P., 102. Such was also the early view in Equity, as may be seen by referring to *Hook v. Kinnear*, 3 Swanst., 417 note, when the Lord Chancellor (1743), said: "it is certain if one person enters into an agreement with another for the benefit of a third person, such third person may come into a Court of Equity and compel a specific performance."

Subsequently, however, this doctrine was contravened at law by the case of *Tweddle v. Atkinson*, 1 B. & S., 393, where the Court disregarded the earlier authorities (those, however, which we have noted do not appear to have been cited), and held that a third person cannot sue at law on a contract made by others for his benefit, even if the contracting parties have agreed that he may, and they laid it down also, (departing from the doctrine of *Dutton v. Poole*, 2

Lev., 210), that near relationship makes no difference. And a similar position in equity appears to be laid down by Lord Langdale, in *Colyear v. Lady Mulgrave*, 2 Keen, 98, in which he remarked substantially as follows: "that if there is a covenant by one person with another to pay a sum of money to a stranger, or do any act for the benefit of a stranger, who is not a party to the instrument or agreement, the person to whom the money is to be paid, or who is to be benefitted cannot sue, either at law, or in equity, because there is no privity of contract."

But one finds in the still later decisions, a strong disposition to revert to the earlier rule, and to give a right of redress to the stranger so circumstanced. The more modern cases in effect adopt the position which was laid down by Lord Alvanley (a judge who distinguished himself both in equity and on the common law bench), in *Pigott v. Thompson*, 3 B. & P., 149 (1802). He there said: "it is not necessary to discuss whether, if A. let land to B., in consideration of which the latter promises to pay the rent to C. his executors and administrators, C. may maintain an action on that promise. I have little doubt, however, that the action might be maintained, and that the consideration would be sufficient; though my brothers seem to think differently upon this point. It appears to me that C. would be only a trustee for A., who might for some reason be desirous that the money should be paid into the hands of C." The same view is taken by Sir William Grant, in *Gregory v. Williams*, 3 Mer., 582, a case which is at the basis of the admirable judgment of Strong, V. C., in *Mulholland v. Merriam*, 19 Grant, 288. In that case the defendant had agreed with a person deceased, that upon an assignment of real and personal estate to him by the deceased, he would

STRANGER TO CONTRACT ENFORCING IT—PERSONAL PROPERTY IN ICE.

pay thereout certain sums to the children of the deceased. It was contended that the beneficiaries had no right to seek to recover the amounts by a suit in their own names, but that the only remedy was by an action at law in the name of the personal representative of the father with whom the agreement had been made. The Vice-Chancellor, however, argued thus: that if a personal representative of the deceased did sue at law and recover the money from the defendant, he would recover as trustee for the beneficiaries. If the money when recovered would be affected with a trust, so would in like manner the right of action which vested in the personal representative be impressed with a like trust, and if so, then the personal representative and the beneficiary might conjointly maintain the bill. For this he cites *Gregory v. Williams*. Another and later decision might also have been referred to, and to the same effect, namely, that of Vice-Chancellor James, in *Peel v. Peel*, 17 W. R., 586. In *Mulholland v. Merriam*, there was no personal representative of the deceased, and as such a representative would have been merely a formal party, the Vice-Chancellor directed that the suit might proceed in the absence of any person representing the estate of the deceased under the authority of the general orders. This decision was affirmed on re-hearing by the full court in S. C., 20 Gr., 152. The views of the present Chancellor upon this important question may be found in *Shaw v. Shaw*, 17 Gr., 282. He there held that when land was conveyed in consideration of the grantee's agreeing to convey a part to a third person who was a stranger to the transaction, this third person could maintain a suit in his own name for the recovery of the part in question. In that case, both the contracting parties were made defendants, and the benefi-

ary was the plaintiff. The Chancellor at p. 285, pointedly adverts to this, and says that in his opinion the suit was properly constituted.

The conclusions reached in these Canadian decisions are also fortified by very recent English authorities. Thus in *Touche v. Metropolitan Railway Warehousing Company*, L. R. 6 Ch. 777, Lord Hatherley states that there is authority for holding that where a sum is payable by A. B., for the benefit of C. D., then C. D. can claim under the contract, as if it had been made with himself. See also *Gale v. Gale*, L. R. 6 Ch. D. 144.

In the Irish courts reference to the following cases will be found useful on this head of the law. In *Joyce v. Halton*, 11 Ir. Ch. R. 123, the Master of the Rolls in Ireland decided against the right of third persons collateral to the contract to sue. This was reversed on appeal in S. C., 12 Ir. Ch. R. 71, the Lord Justice giving very much the same reasons as Vice-Chancellor Strong. See also *Coulray v. Thompson*, I. R. 2 Ch. 226, where the authority of *Tweddle v. Atkinson* was recognized and followed: *Brennan v. Brennan*, Ir. R. 2 Eq. 270, where the right of the third parties to intervene was given effect to, chiefly on the ground that the agreement was in the nature of a family arrangement, and for the benefit of the relatives who brought the suit.

PERSONAL PROPERTY IN ICE.

In this Canada of ours we see ice, both in winter and summer. In winter, its principal use is to provide a means of exercise for the rising generation, and to a more limited extent, to enable surgeons to practice setting broken limbs, and lawyers to bring actions against corporations and others. In summer it is largely used for various household purposes, as well as for many others, varying from an out-

PERSONAL PROPERTY IN ICE.

ward application to counteract a sun-stroke, to an inward application to "cool the coppers" of those who have made their alcohol unwholesome, according to the Celtic theory, by too great an admixture of water the night before.

Ice is, of course, an article of commerce of some importance, and is therefore entitled to its own special litigation in these Millennial days, when litigants politely endeavour to "swear their cases through," with smiles on their faces, and malice in their hearts, instead of the old "a word and a blow" of what we are pleased to call the "dark ages." But we should not enlarge on this topic for fear of endangering the craft.

The litigation on this subject, is not, however, very extensive. The last case we have seen discusses the elementary question, as to whether ice is personal property; and it was then decided, with undoubted correctness, that a sale of ice, ready formed, whether in or out of the water, as a distinct commodity, is a sale of personalty. It was further held that a parol bargain for ice formed on the surface of a pond, both parties being in view thereof, and the price being paid on the spot, passed the title (*Higgins v. Kusterer*, Supreme Court, Michigan, U. S., noted in *Central Law Journal*). The Chief Justice in delivering judgment, said:—

"While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet it seems absurd to hold that a product which can have no use or value except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by melting, should be classed as realty instead of personalty, when the owner of the freehold chooses to sell it by itself. When once severed no skill can join it again to the realty. It has no more organic connexion

with the estate than anything else has that can float upon the water. Any breakage may sweep it down the stream and thus cut off the property of the freeholder. It has less permanence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place, or not at all, and can only be kept in existence by cold weather. In the present case the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but it could not be preserved from the other risks and incidents of its precarious existence. Any storm or shock might in a moment convert it into floating masses which no ingenuity of black-letter metaphysics could annex to the freehold.

"It does not seem to us that it would be profitable to attempt to determine such a case as the present by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops, and emblements. Ice has not been much dealt with as property until very modern times, and no settled body of legal rules has been determined upon concerning it. So far as the principles of the common law go, they usually, if not universally, treated nothing movable as realty, unless either permanently or organically connected with the land. The tendency of modern authority, especially in regard to fixtures, has been to treat such property according to its purposes and uses as far as possible.

"The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil; and it is only valuable when removed from its original place. Its connexion—is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty; and its only use tends to its immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice already formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water."

LAW SOCIETY.

MICHAELMAS TERM, 43RD VICTORIAE, 1879.

Resumé of proceedings of Convocation during this Term :

MONDAY, NOV. 17th.

Mr. Irving was moved into the chair in the unavoidable absence of the Treasurer.

The Report of the Examiners on the examination of candidates for call was received and read, reporting the following gentlemen as having passed a satisfactory examination for call to the Bar, namely : Messrs. W. J. Delaney, G. H. Hopkins, J. W. Holmes, W. M. Reade, J. S. Macdonald, J. C. Lillie and W. J. Franks.

The Sub-treasurer reported that the following gentlemen, namely : W. J. Delaney, G. H. Hopkins, J. W. Holmes, W. M. Reade, J. S. Macdonald, J. C. Lillie, had complied with all the rules of the society, and might be called to the Bar.

Ordered accordingly.

Ordered, that W. J. Franks, upon his filing the necessary petition, bond and presentation, may be called.

The Report of the Examiners on the examination of Candidates for admission as Attorneys was received and read, reporting the following gentlemen as having passed, namely, Messrs. F. Fitzgerald, G. H. Hopkins, W. F. Morphy, T. S. Plumb, W. R. Hickey, R. W. Jameson, J. J. Scott, P. A. Macdonald, H. E. Morphy, C. S. Rankin, A. Caras and J. B. Rankin.

The Sub-treasurer reported that the articles and services of the following were correct, namely, Messrs. F. Fitzgerald, W. F. Morphy, G. H. Hopkins, W. R. Hickey, R. W. Jameson, J. S. Scott, A. Caras, J. B. Rankin ; that they might receive their certificate of fitness : ordered accordingly. Ordered that C. S. Rankin, upon the Sub-treasurer receiving proper certificate from the principal in whose office the said Rankin had served, may receive his certificate of fitness.

Ordered, that the following be referred to the Legal Education Committee : The cases of Mr. P. A. Macdonald and Mr. H. E. Morphy.

Ordered, that the case of Mr. T. S. Plumb be referred to a special committee, under the rule for special cases.

Mr. Leith, Mr. Hoskin and Mr. Kerr to be the special committee to deal with Mr. Plumb's case.

Report of the Examiners on the first Intermediate examination was received and read.

The Secretary reported that the following candidates had passed their examinations as Articled Clerks in due course, namely, Messrs. W. H. Hewson, T. A. Gorham, J. Christie, W. A. Geddes, A. T. S. McVeity, V. Switzer, J. W. Russell, A. A. Hughson, J. Chisholm, H. D. H. Helmcken, E. E. Kittson, F. W. Davis, F. McDougall, D. Buchanan, W. V. MacIise, C. G. O'Brian, A. J. W. McMichael, E. A. Foster, J. C. Grant, G. H. Smith, J. A. O'Rourke, L. H. Dickson.

Ordered, that the foregoing gentlemen be allowed their examinations, as the first Intermediate for Articled Clerks and Students-at-Law.

Ordered, that the Hon. D. Mills be allowed his examination as the first Intermediate of a Student-at-Law.

Ordered, that the cases of Mr. McDermott and Mr. Keys be referred to the Legal Education Committee.

The Report of the Examiners on the second Intermediate Examination was received and read.

The Secretary reported that the following gentlemen passed this examination in due course, namely, Messrs. Ponton, J. G. Geddes, T. H. Thompson, H. Buchanan, G. Bell, J. B. O'Brian, A. E. Irving, D. H. Cooper, F. C. Moffatt, A. McKay, W. C. Hamilton, W. H. Bennett, J. Harrison, G. W. Baker, P. Mulkern, A. Stewart and W. M. German.

Ordered, that their examination be allowed as the second Intermediate of Students and Articled Clerks.

The cases of A. B. Cox, James Henry and W. E. Macara were referred to the Legal Education Committee.

The Report of the Special Committee on the case of Mr. Plumb was received, read and approved.

LAW SOCIETY, MICHAELMAS TERM, 1879.

Ordered, that he receive his certificate of fitness.

Mr. Hodgins brought up Report of Legal Education Committee, as to appointment of Examiners and Examinations, referred to them by Convocation in Trinity Term.

Ordered, that it be considered on Saturday next.

Messrs. W. J. Delaney, J. W. Holmes, W. M. Reade and J. C. Lillie were called to the Bar.

The petition of T. T. Rolph was referred to the Finance Committee, with power to act.

The case of Mr. F. W. Campbell, of Nanpess, and letter of J. B. Read, Esq., the Solicitor, were referred to Finance Committee, with power to act.

The case of Mr. Lowe was referred to said Committee, with power to act.

Adjourned.

TUESDAY, November 18th, 1879.

Report of Legal Education Committee on Students for Admission and Articled Clerks was received and read.

Ordered that the following gentlemen who have been reported as Graduates, be entered on the books of the Society as Students-at-Law:

Peter Sinclair Campbell, B.A., University of Toronto.

Alex. Edward Ward Peterson, B.A., Victoria College.

James Andrew Thomas, B.A., Victoria College.

Edward Robert Cameron, B.A., University of Toronto.

George Benjamin Douglas, B.A., University of Toronto.

John Joseph O'Meara, B.A., University of Toronto.

John Wilson Elliott, B.A., University of Toronto.

Ordered, that the following gentlemen, who have been reported entitled as Matriculants, namely,

University of Toronto. — James Graco, William Atchison Proudfoot, William T. Allen, Henry Thompson Brock, Albert Carswell, Albert Ephraim Grier, Adolphus August Kraft, William Edward Middleton,

Charles Potter, John Clinnie Drewry (Albert University), Frank Hedley Phippen (Albert University), Glanville C. Cunningham, Charles A. Grier, John Wilford, John A. Richardson (University of Toronto), and Flavius L. Brooke (Albert University), be entered on the books as Students-at-Law.

Ordered, that the following gentlemen who have been reported as having passed the examination, namely, John Thomas Sproule, Dyce W. Saunders, Henry John Wickham, George Hales, Arthur Burwash, John Alexander McIntosh, George Conry Thomson, Norman McMurchy, Checkly Francis Johnston, William James Church, Hume Blake Elliott, Sheriff Harkins, James Miller, Charles Franklin Farewell, Alexander George Murray, William Highfield Robinson, John McNamara, Frederick Thistlewaite, Charles Morse, Edward Augustus Wismer, Joseph Alphonse Vallin, George Weir, Walter Samuel Morphy, Louis Hayes, James S. Boddy, be entered on the books as Students-at-Law and John Arthur Albright as Articled Clerk.

Report of Legal Education Committee on the petition of Mervyn McKenzie received, read and ordered for immediate consideration.—Adopted.

Report of Legal Education Committee on the case of G. B. Douglass received, read, and ordered for immediate consideration.—Adopted.

Ordered, that on the payment of \$10 Mr. Douglas be entered on the books as a Student-at-Law in the Graduate Class.

Report of the Legal Education Committee on the case of C. W. Mortimer read and ordered for consideration.

Ordered that the petition be referred to the Finance Committee, with power to act.

Letter of Wm. Deveroux read. No action ordered.

Report of Legal Education on case of Mr. J. G. Kelly, 6th Dec., 1878, read and adopted.

Statement of Sub-treasurer as to Mr. Kelly's fees made.

Ordered, that he be refunded the \$10 paid by him under protest.

Mr. Kelly was called to the Bar, pursuant to the order of 6th December.

The letter of Mr. Hamilton, and the enclosed memorial to the Attorney-General of numerous members of the profession, on the subject of means of access to the offices of the Master in Chancery and Registrar of the Court of Appeal, was read and ordered for immediate consideration.

Moved by Mr. Hodgins, seconded by Mr. MacLennan.

That in the opinion of Convocation a more convenient means of access from the main building and Library to the offices of the Master in Chancery, and Registrar of the Court of Appeal, and Chambers of the Judges in Appeal, should be provided for the use of the profession, and that the Treasurer be requested to bring the matter before the Government.—Carried.

Mr. Hopkins and Mr. Franks were called to the Bar.

SATURDAY, November 22nd.

The Report from the Legal Education Committee respecting the cases of Messrs. Coffee, H. E. Morphy, P. A. Macdonald, A. Beverly Cox, James Henry Macara, W. M. McDermott, H. D. Helmcken, J. B. McLaren, E. N. Lewis, F. H. King and C. W. Oliver, was received and read.

Ordered for immediate consideration and adopted.

Ordered, that Messrs H. E. Morphy and P. A. Macdonald do receive their certificates of fitness.

The Report from the same committee on the cases of M. W. Russ and Joseph Alphonse Valin was received and read.

Ordered for immediate consideration.

Ordered that the above named Marcus W. Russ and Joseph Alphonse Valin be entered on the books as Students-at-Law.

Report of the Finance Committee on the subject of the proposal of the President of the Telephone Despatch Company, to connect Osgoode Hall with the general Telephone system of the Company, was received and read.

Ordered for immediate consideration and adopted.

The Report of the same committee in reference to the waste of water was received and read.

The chairman of the Committee on dis-

cipline presented the report of the committee on the case of R. R. Waddell, Esq., of Hamilton, which had been referred to them by Convocation for investigation and report.

The Report was received and read.

Ordered for immediate consideration and adopted.

Pursuant to the order of Monday last, the chairman of the Committee on Legal Education brought up the report of that committee on the subject of Examiners and Examinations.

Ordered, That the Report be considered by Convocation on Saturday next, the 29th instant, and that notice thereof be given by the Secretary to each Bench.

Ordered, That the letters of Mr. Macklem and Mr. Hough be referred to the Finance Committee, with power to act.

Ordered, That the Secretary do acknowledge the receipt of Mr. Falconbridge's letter, in reference to the theft of his hat from the Hall, and say that Convocation can do nothing in the matter.

The petition of George Osborne Montgomery was referred to the Finance Committee, with power to act.

The letter of Mr. Robinson, Editor of the Reports, on the subject of a room for the use of the reporters was read.

Ordered, That the Secretary do reply to the effect that Convocation is not prepared to make any order on this subject at present.

Mr. J. Sandfield Macdonald was called to the Bar.

Mr. Crooks gave the following notice of motion with respect to call of Barristers, and for admission of Attorneys and Solicitors taking the degree of Bachelor of Laws :

Any person having successfully passed the examination now prescribed for the degree of Bachelor of Laws in the University of Toronto, by its present or any future curriculum with equivalent requirements, may be called to the Bar, or admitted as an Attorney or Solicitor ; in the case of a Barrister, after four years from his admission as a student of this Society, and in the case of an Attorney or Solicitor, after hav-

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ing duly served under articles of clerkship for the term of four years, which period may have elapsed either before or concurrently with the passing of said examination for such degree. This rule shall not affect any of the provisions of other rules of the Society with respect to graduates.

Ordered, that the Secretary supply every member of Convocation with a copy of Mr. Crooks' notice, and the same be considered by Convocation on Saturday, the 29th instant.

Mr. Preston's letter to the Treasurer, referring to an irregularity in respect of the bringing of suit of the Albert Cheese Co. v. Leaming, was read.

Ordered, that it be referred to the Discipline Committee.

Mr. Hodgins gave the following notice of motion, namely, that on the consideration of the report of the Committee on Legal Education, on the subject of Examiners and Examinations, next Saturday, he will move the following resolution :

1. That four Examiners in Law be appointed, who shall be Barristers of at least five years' standing at the Bar, and who shall hold office for four years, and receive a salary of \$600 per annum.

2. That the said Examiners be appointed to Examine in the following subjects :

- (a.) Commercial and Maritime Law.
- (b.) Real Property.
- (c.) Equity Jurisprudence.
- (d.) Criminal Law and the Law of Torts.

3. That the said Examiners conduct all Intermediate Examinations of Students-at-Law and Articled Clerks, all Scholarship Examinations, all Final Examinations for the call of Barristers, and for the admission of Attorneys and Solicitors, and such other and special examinations in law as the Benchers may prescribe.

4. That a sufficient number of Examiners for Matriculation be appointed during each term preceding the examination of candidates for admission as Students-at-Law and Articled Clerks, who shall conduct the Primary Examination of such candidates during the term for which they shall be so appointed.

5. That the Examinations of the Law Society be held as follows :

1. PRIMARY EXAMINATIONS. — The Primary Examinations for the admission of

Students-at-Law and Articled Clerks, on the Tuesday, Wednesday and Thursday of the third week before Hilary and Michaelmas Terms. The Examination of Graduates and Matriculants as Students-at-Law and Articled Clerks, on such days prior to Hilary, Easter, Trinity and Michaelmas Terms as the Committee on Legal Education may appoint.

2. INTERMEDIATE EXAMINATIONS. — The First Intermediate Examination of Students-at-Law and Articled Clerks, on the Tuesday and Wednesday of the second week before each Term. The Second Intermediate Examination of Students-at-Law and Articled Clerks, on the Thursday, Friday and Saturday of the second week before each term.

3. FINAL EXAMINATIONS. — The ordinary Final Examinations for the call of Barristers, on the Monday, Tuesday and Wednesday of the week preceding each Term. The additional examination for call with Honours, on the Thursday and Friday of the same week. The Final Examinations for the admission of Attorneys and Solicitors, on the Thursday, Friday and Saturday of the week preceding each Term.

4. SCHOLARSHIP EXAMINATIONS. — The Scholarship Examinations on the Tuesday, Wednesday and Thursday of the second week of Michaelmas Term.

6. That the last of the days above prescribed for the said Primary, Intermediate, Final and Scholarship Examinations be appropriated to the oral examination of the candidates.

7. That the Examinations on each of the said days be held during the following hours :

Forenoon examinations to commence at ten o'clock in the forenoon and close at half-past twelve in the afternoon.

Afternoon Examinations to commence at two o'clock and close at half-past four o'clock.

8. That two Examiners, or one Examiner and a Benchers be present during the whole time of the Examinations.

9. That any Articled Clerk, being also a Student-at-Law, who as such Student-at-Law has passed, during his clerkship, the Intermediate Examinations required by the rules of this Society, shall be allowed such Intermediate Examinations as Intermediate Examinations required by the statute, without further examination or certificate to that effect by the Secretary of the Law Society.

Ordered, that the Secretary supply every member of Convocation with a copy of

Mr. Hodgins' notice, and that it be considered by Convocation on Saturday next, the 29th instant.

Mr. Robertson moved, seconded by Mr. Cameron, that Messrs. Leith, Crickmore and Dr. Smith be a Committee of Benchers, under the rules of June, 1876, provided for special cases, before whom Mr. R. R. Waddell, an applicant for call, may be examined; the said Robert R. Waddell being an Attorney and Solicitor of at least ten years' standing.—Carried.

SATURDAY, NOV. 29th.

Mr. Hodgins presented the Report of the Committee on Legal Education, on the cases of J. B. McKillop, N. P. Graydon, G. Muirhead, E. F. B. Carey and D. G. Downey, which was considered and adopted, and services allowed accordingly.

Mr. Hodgins presented the report of the same committee, on the case of W. H. Barry, which was considered.

Ordered, that Mr. Barry be entered on the books as a Student-at-Law.

Mr. Hodgins presented the Special Report of the same committee, recommending the fitting up of cupboards in the Examiner's room, pursuant to a plan and tender, at an expense of \$104, which was considered and adopted.

Mr. Hodgins presented a Special Report of the same committee, proposing that fees should be charged for certificates of admission, and for Barristers' diplomas.

The report was considered and adopted.

Mr. Maclellan presented the Report of the Committee on Reporting, which was read clause by clause and adopted, with the exception of the third clause.

A letter from Mr. Dwight, the manager in Toronto of the Montreal Telegraph Company, was read, in which he applied for permission to open a branch office of the company in Osgoode Hall.

The letter was referred to the Finance Committee, with power to act.

Mr. Maclellan moved that the Finance Committee be instructed to endeavour to arrange for the placing of a post-office letter box at Osgoode Hall.—Carried.

A letter from Mr. F. E. Hodgins, applying for the use of the lecture room, for the

delivery of a course of lectures on Logic, was read and referred to the Legal Education Committee, with power to act.

A letter from Mr. Allan Cassels, on the subject of the thefts from the profession, at Osgoode Hall, was read. The letter of Mr. Falconbridge on the same subject, dealt with last meeting, and the action of Convocation thereon, were ordered to be reconsidered.

Ordered, that Mr. Crooks be requested to call the attention of the Government to the circumstances stated in the letters in question, with a view to preventing their recurrence.

The Treasurer reported that, pursuant to the directions of Convocation, he had waited on the Attorney-General, and represented their views on the subject of the access to the offices of the Master in Chancery and Registrar in Appeal, and that the Attorney-General had directed Mr. Tully to report on the possibility of the plan suggested, with a view to its being carried out; that the Treasurer had met Mr. Tully by appointment, at Osgoode Hall, and gone over the ground, when Mr. Tully stated that there was no difficulty in carrying out the plan, and that he would report accordingly.

Mr. Crooks moved, pursuant to notice, the following motion:

Any person having successfully passed the Examination now prescribed for the degree of Bachelor of Laws in the University of Toronto, by its present or any future curriculum, with equivalent requirements, and having obtained such degree, and having also successfully passed an examination before this Society, in the subjects of the Statute Law, and the Practice and Pleadings of the Courts, and in Criminal law, may be called to the Bar, or admitted as an Attorney or Solicitor, upon payment of the usual fees; in the case of a Barrister, after four years from his admission as a Student of this Society, and in the case of an Attorney or Solicitor, after having duly served under Articles of Clerkship for the term of four years, which period may have elapsed either before or concurrently with the passing of said examination for such degree. This rule shall not affect any other provisions of the rules of the Society with respect to graduates.

Mr. Read moved that the further consideration of the motion be adjourned to the

LAW SOCIETY, MICHAELMAS TERM, 1879.

next meeting of Convocation, and that the notice be reprinted and distributed to the Benchers, with an intimation that it will then be taken up.

The further consideration of the Report of the Legal Education Committee, on the subject of Examiners and Examinations, was then taken up.

Mr. Hodgins moved in amendment a series of resolutions, which were put clause by clause, and finally adopted, as follows :

1. That four Examiners in Law be appointed, who shall be Barristers of at least five years' standing at the Bar, and who shall hold office for three years, subject to the removal of any of them, at the discretion of Convocation, and each of which Examiners shall receive a salary of \$600 per annum.

2. That the said Examiners be appointed to examine in the following subjects:

- (a.) Commercial and Common Law.
- (b.) Real Property.
- (c.) Equity Jurisprudence.
- (d.) Criminal Law, the Law of Torts, and Maritime Law.

3. That the Law Examiners conduct all Intermediate Examinations of Students-at-Law and Articled Clerks, all Scholarship Examinations, all Final Examinations for the call of Barristers, and for the admission of Attorneys and Solicitors, and such other and special Examinations in Law as the Benchers may prescribe.

4. That three Examiners be present during the whole time of the written examinations.

5. That any Articled Clerk, being also a Student-at-Law, who as such Student-at-Law has passed, during his clerkship, the Intermediate Examinations required by the rules of this Society, shall be allowed such Intermediate Examinations, as Intermediate Examinations required by the statute, without further examination or certificate to that effect by the Secretary of the Law Society.

The Report of the Examiners on the Scholarships Examinations was read.

The Scholarships were awarded as follows :—

Fourth year.....Mr. Nesbit.
Third yearMr. Drayton.
Second year.....Mr. Burgess.
First year.....Mr. J. L. Murphy.

Mr. Irving gives notice of motion, for the next sitting,

That on the first day of Hilary Term next, and on the first day of every Hilary Term in each year thereafter, a return shall be laid before Convocation, shewing—

1. The names of Attorneys who have taken out certificates for the current year.

2. The names of Attorneys whose names appear on the roll of Attorneys who have omitted to take out certificates for the current year.

3. A Report from the Solicitor of the action or proceedings taken, and the result of such proceedings upon cases where certificates have not been taken out for the year preceding, and that, on the first day of Hilary Term next, shall be laid before Convocation.

4. A Report from the Solicitor upon the cases of all Attorneys whose certificates are unpaid for any year up to the 31st December, 1878.

FRIDAY, 5th Dec., 1879.

Mr. Crooks reported the result of his interview with the Attorney-General on the subject of the recent thefts at Osgoode Hall, and stated that the Attorney-General suggested that the Law Society should organize some plan for securing accommodation for practitioners.

Mr. Crooks moved that the subject be referred to the Finance Committee, with instructions to report to Convocation.—Carried.

Mr. Kerr presented a Report from the County Libraries Aid Committee on the subject of the Hamilton Association, and containing a general recommendation, which was considered and adopted.

A letter from Mr. Jex, on the subject of the payment of his special fee, was read.

Ordered that Mr. Jex be informed that his case was disposed of, after full consideration, and that his letter presented no grounds for reconsideration.

Letters of recommendation for Mr. Lightbourne and Mr. Eddis for the office of Auditor were read, and referred to the Finance Committee.

Mr. Crickmore presented the Report of the Select Committee on the examination of Mr. Waddell.

Ordered that it be forthwith considered. The report was adopted.

Mr. Maclellan moved that Mr. Waddell be required to pay the sum of \$200, in addition to the usual fee, as required by the rules under which he was examined, and that he be thereupon called.

Mr. Robertson moved that Mr. Waddell be called on payment of \$150, the usual fees in ordinary cases.

The amendment was lost.

Mr. Maclellan's motion was carried.

Mr. Leith moved second reading of rule as to Examiners and Examinations.—Carried.

Mr. Leith moved third reading of same rule.—Carried.

Mr. Leith moved that the usual advertisement, under the direction of the Legal Education Committee, be published, intimating that Convocation will, on the 30th December, appoint four Examiners, pursuant to the above rule, and that notice be given to each Benchers of such meeting.—Carried.

The debate on the first reading of Mr. Crooks' proposed rule was resumed.

Mr. Crooks proposed to further amend the rule by inserting the words "Presented for call and admission respectively for the final examination, may, upon payment of the fees required in ordinary cases," immediately after the words "Passed an examination before this Society in the subjects."

Mr. Crooks moved the adjournment of the debate till the next meeting.

Mr. Crooks gave notice that he would, at the next meeting, move for the authority of Convocation for the institution of such legislation as may be necessary to give Convocation further power to deal with the subjects referred to in the rule.

Mr. Irving moved his resolution as to Attorneys' certificates, which was carried.

Mr. Irving also moved that a copy of the roll be printed, for the purpose of carrying out the above resolution.—Carried.

Mr. Waddell was called to the Bar. Convocation rose.

SELECTIONS.

THE JURY QUESTION.

The jury system has suffered in public estimation from excessive adulation on the one hand, and excessive denunciation on the other. Like every other social system, it is probably susceptible of improvement; at all events, it demands modification to suit the changed circumstances of society. *First*: It is our firm belief that the jury is invaluable as a political system, in educating the citizen to feel a personal responsibility for government, in dividing the responsibility for legal decisions, and in standing between the individual and great monopolies, such as banks, and railway and insurance companies. *Second*: The system as it stands has not worked ill. Wrong verdicts and disagreements are exceptional. The public always hear of disagreements and wrong verdicts, while little is said of the vast majority of just verdicts. The ablest judges in this country have assured us that they have rarely known an absolutely unjust verdict. *Third*: Disagreements and wrong verdicts are very frequently the fault of the judge rather than the jury. Disagreements are often produced by excessive refinements and balancings in the charge, and wrong verdicts sometimes are the result of the judges usurpation of the advocate's office. *Fourth*: Except in large cities the intelligence and honesty of jurors is much underrated by the public. *Fifth*: We can conceive nothing more ill-advised than an unchanging bench of judges to decide all questions of fact arising in a community. Such centralisation of power is certainly extremely inconsistent with republican institutions. If two suitors desire to have their differences decided by one man, they have the privilege, but the right of either to demand a jury is inestimable. *Sixth*: The single change we would make in the system is to allow nine to pronounce a verdict in all cases but capital cases and those punishable with imprisonment for life; in the latter, unanimous verdicts should be required. But with all its imperfections, we should as little think of pronouncing the system a "nuisance" as

CLUB LAW.

it stands, as of pronouncing sunshine and water nuisances, because of occasional sunstrokes and malaria.—*Albany Law Journal*.

CLUB LAW.

Mr. Labouchere has been reinstated in the Beefsteak Club, by the decision of the Master of the Rolls that he was irregularly expelled. Now the Beefsteakers will probably try it again. Since our last, the decisions of the same judge, in the case of Major Fisher, of the Army and Navy Club, has been published: *Fisher v. Keane*, 41 L. T. N. S. 335. The major had been a member of that club about twenty years. One evening, after dining there, he joined a game of pool, one of the players being a guest of another member of the club, and also a friend of the plaintiff. The guest, finding the game did not proceed so rapidly as he desired, said to the plaintiff, "Get on, I want to go home; you are drunk." The plaintiff answered, "I don't think I would say such a thing to you at your club," and the guest replied, "You are drunk." Thereupon the plaintiff said "You are a d——d liar," or "its a d——d lia." A rule of the club empowered the committee, in the case of conduct by any member, injurious to the character and interests of the club, to recommend him to resign, and if the recommendation should not be observed within a month, to call a general meeting which should decide the matter by ballot. If the committee are unanimously of the opinion that the offence is so grave as to warrant immediate expulsion, they are empowered to suspend, which becomes final, unless within twenty-one days twenty members demand a general meeting. The committee consists of twenty-four. The major's offence was reported to them at a meeting at which nine were present (three forming a quorum), and having examined two members who were present at the incident, they suspended the major. The major had no previous notice of this action, but meantime had written an apology to the guest, who had expressed his satisfaction to the committee. He also explained to the com-

mittee that he had some years before met with a severe fall, which had made his head weak, and offered to make any apology deemed requisite. The only answer of the committee was to "bounce" the major at the end of twenty days. This action was subsequently approved by a large majority at a general meeting. Now the Master of the Rolls says this was all wrong. He holds that the unanimous consent of the entire committee was necessary to suspension, and that the unanimous consent of those present at the meeting was not sufficient. He then concludes:

"As to the second ground, in my opinion a committee acting under such a rule as this are bound to act, as Lord Hatherley said, according to the ordinary principles of justice, and are not to convict a man of a grave offence which shall warrant his expulsion from the club without fair, adequate, and sufficient notice, and an opportunity of meeting the accusations brought against him. They ought not, as I understand it, according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons, who decide upon the conduct of others, to blast a man's reputation forever, perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct. In my opinion, upon this ground also, the committee have not acted properly or fairly."

The conduct of this club strongly resembles that of a ministerial convention or a women's sewing society. It seems to our blunted perceptions that the major ought to have been acquitted, and the guest suspended; but we don't know much about clubs. The case of *Hopkinson v. Marquis of Exeter* is reported in L. R., 5 Eq. 63; 17 L. T. N. S. 368. See, also, *Dean v. Bennett*, L. R., 6 Ch. 489; 24 L. T. N. S. 169; *Reg. v. Governors of Darlington School*, 14 L. J. 67, Q. B. See, also, *Angell & Amos on Corporations*, 10th ed., § 410, note (a).—*Albany Law Journal*.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

C. C.] [Dec. 1, 1879.
NERLICH v. MALLOY.

Division Court Bailiff—Action for false return.

To an action against a bailiff and his sureties for a false return, they pleaded that the bailiff immediately levied, but that he was at once notified by the attorney of one of the principal creditors of the execution debtor, that if he proceeded to sell, the debtor would be placed in insolvency, and that before the goods were sold, and while they were being advertised pursuant to the statute, a writ of attachment was issued, and an assignee appointed, whereupon the bailiff gave up the seizure and returned the writ, and that the plaintiff suffered no damage.

At the trial the learned Judge withdrew the case from the jury, and directed a verdict for the defendant, on the ground that this plea and another had been proved, and refused a rule nisi for a new trial.

Held, reversing the judgment of the County Court, that the plea was a good defence to the action, although under the 221st section of the Division Court Act the plaintiff would have been entitled to nominal damages upon the bare proof of breach of duty, without showing any injury; but that it was for the jury and not for the Judge to say whether the inaction of the bailiff had caused the plaintiff's damage, and a new trial was therefore ordered.

Before commencing the present action, the plaintiffs had taken summary proceedings by way of summons, under the 220th section of the Division Court Act, against the bailiff, which summons was discharged.

Held, that the order was not a bar to an action, under the following section, for a false return.

O'Donohoe for the appellant.

J. McDougall for the respondent.

Appeal allowed.

Q. B.]

[Dec. 1.

GAULT v. BAIRD.

Insolvent Act—Deed of composition.

A deed, professing to be under the Insolvent Act, was made between the insolvents of the first part, certain sureties of the second part, and "the several persons, firms and corporations who are creditors of the parties of the first part, and also are mentioned in the annexed list, of the third part." It provided for the payment of composition by the insolvents of 75c. in the dollar, which payment was guaranteed by the sureties, and contained the following clause: "This deed shall be ineffectual unless and until completed by all creditors having claims for over one hundred dollars."

Held, on demurrer, affirming the judgment of Osler, J., that this clause only applied to creditors mentioned in the annexed list, and that certain other creditors, having refused to come into the arrangement did not prevent the deed from being operative.

H. J. Scott for appellant.

G. C. Gibbons for respondent.

Appeal dismissed.

C. C.]

[Dec. 1.

RE McCracken.

Insolvency—Landlord's lien.

Held, If before an assignment or attachment in insolvency the landlord has levied, the assignee cannot take the goods out of his possession without payment or tender of the six months' arrears.

After the assignee has taken possession, the landlord cannot seize, but he is entitled to be paid the six months' arrears out of the proceeds of the goods in the demised premises, in preference to any other claim.

The landlord is not a privileged creditor, but is merely entitled to a lien upon the goods of the insolvent which he might have distrained.

If the assignee sells upon credit, he must arrange with the landlord before the goods are removed; otherwise he becomes liable to an order for immediate payment.

If the creditors or inspectors order the assignee to make such a sale, and do not provide him with the means of satisfying

C. of A.]

NOTES OF CASES.

[C. of A.]

the landlord, he should apply to the judge for direction.

Whenever the assignee is remaining in possession unreasonably long without realizing or satisfying the landlord, the latter may invoke the summary jurisdiction of the Court.

R. Martin, Q. C., for the appellant.

Hoyles for the respondent.

Appeal dismissed.

Chy.]

[Dec. 1.]

SMITH V. DOYLE.

Bill filed in behalf of plaintiff and all other creditors—Effect of.

This was a suit brought by the assignee in insolvency of P. D., to impeach a sale of real estate to the defendant. The answer set up that before the proceedings in insolvency a bill was filed by W. S. and J. S., as execution creditors, in behalf of themselves and all other creditors who should contribute to the expenses of the suit, for the purpose of avoiding the conveyance in question, as a fraud upon creditors, and that after answer the bill was dismissed. It was alleged that the facts set up in the two bills were substantially the same; that the case made by each was the same, and that the defendant believed that the evidence, if this suit proceeded, would be similar in effect to that upon which the plea refusing relief was founded.

Held, that the decree was not a bar to this suit.

Donovan for the appellant.

O'Donohoe for the respondent.

Appeal allowed.

Chy.]

[Dec. 1.]

MUNRO V. SMART.

Will—Construction of.

The testatrix devised all the rents and profits of her estate to C., an unmarried daughter, so long as she remained unmarried, and upon her marriage the whole to be divided between her and her four sisters, but if she died unmarried the division was to be amongst her four sisters; and in case of either of these four dying before the marriage or death of C., the share of the one so dying to go to her children; and

then followed a provision that in case of the death of any of her "said" daughters, without leaving child or children, the share of such daughter was to be divided among the surviving daughters, and the children of deceased daughters.

Held, reversing the decree of the Court of Chancery, that it was clearly the intention of the testatrix that there should be a final distribution of the estate, upon the marriage of C., and that, on that event happening, each of the daughters took an immediate absolute interest.

Crooks, Q. C., and *Cattanach* for the appellants.

Boyd, Q. C., and *Moss* for the respondents.

Appeal allowed.

C. P.]

[Dec. 1.]

MILLER V. REID.

Insolvency—Money paid within thirty days.

A. sold his stock in trade and assets of all kinds to S., the sale being arranged and carried out by one R., to whom the cash portion of the purchase money was paid. R. afterwards, within thirty days of A.'s being declared insolvent, accepted and paid out of this purchase money two drafts drawn on him by the defendant, being the price of the goods for which A. was indebted to the defendant. The plaintiff, as assignee in insolvency of A., sued the defendant to recover back the money so paid him. The defendant set up that the drafts were drawn and the money paid by R. under a personal understanding contained in letters written to him by R.

Held, affirming the judgment of the C. P., that the defendant had probable cause for believing A. to be insolvent, and that the plaintiff was entitled to recover the money, which clearly belonged to the insolvent.

Held, also, that the acceptance was not a valuable security within the meaning of section 134, which the assignee was obliged to restore to the creditors, as a condition precedent to the prosecution of the suit.

McKellar, Q. C., for the appellant.

Walker for the respondent.

Appeal allowed.

Q. B.]

NOTES OF CASES.

[Chan. Cham.]

Q. B.]

[Dec. 1.]

Spragge, C.]

[Nov. 24.]

SCHLESWYER v. DAVIS.

Guarantee for payment of rent—Action on.

To an action on a guarantee given to secure the payment of rent, defendant pleaded that, without his knowledge or consent, the plaintiff accepted a surrender before the expiration of the term, and that there were then goods and chattels upon the premises, liable to distress, more than sufficient to pay the distress.

Held, that the plea was no defence, as a landlord holding such a guarantee is not bound to distrain before suing the sureties.

Brown and Falconbridge for the appellants.

Kerr, Q. C., for the respondent.

Appeal dismissed.

QUEEN'S BENCH.

IN BANCO.

MICHAELMAS TERM, 1879.

HICKS v. SNIDER.

Will—Construction—Estate in fee.

Testator devised as follows: "I make and give all my property, both land, house and all the stock, and every other article I possess now, to my loving wife Elizabeth, by making her my executrix."

Held, that the wife took an estate in fee.

Wallbridge, Q. C., for plaintiff.

Reese, contra.

CHANCERY CHAMBERS.

Referee.]

Nov. 15.

CONNOLLY v. O'REILLY.

Costs on appeal—Sum in gross in lieu of—Practice.

An order allowing \$400 to be paid into Court by appellant, in lieu of bond, will be granted *ex parte*.

In this case *Hoyles*, for appellant, moved *ex parte* for leave to pay \$400 into Court, as security for the costs of appeal.

The Referee made the order.

CLARK v. CLARK.

Partition—Land in different Counties—

G. O. 641—Costs—G. O. 643.

In this suit an order for partition of lands in County of Peel, had been made by the Master at Brampton, under General order 640.

Fleming now moved, under G. O. 641, for the sale or partition, under said order of the Master, of certain lands in County of Grey. It appeared that the Grey lands were not discovered, after the granting of the order by the Master, but were known at the time of the making thereof.

Plumb for the infants.

SPRAGGE, C., held that the case was within the scope and intention of order 641, notwithstanding the use of the words "after an order, &c., lands are discovered in another county."

Held, also, that the case was a proper one for the exercise of the discretion of the Court or Judge, reserved under 643, and costs of the application were allowed, exclusive of commission fixed in the order.

Referee.]

[Nov. 28.]

STEPHENSON v. BAIN.

Sale under decree—Loss after contract signed—Who bears.

Lands were sold under decree for partition or sale in the cause. The purchaser signed the usual contract on the day of sale to purchase the property at \$1,500. The day after the sale the hotel buildings, of which the property was composed, were burned down. The report on sale was made and confirmed. The land, without the building, was worth about \$300. The purchaser had paid his deposit on day of sale, and this application was to compel payment into Court of the balance of purchase money.

Hoyles, for the plaintiff, contended that the English cases in point did not apply, because here an absolute agreement to purchase is entered into, whereas in England only a bidding paper is signed. See *Daniel's Chy. Prac.* p. 1161, and *Daniel's Forms*, p. 1328, and G. O. 384; that the English

Chan. Cham.]

NOTES OF CASES.

[Master's Office.

authorities are opposed to the plaintiff's contention, see *Ex parte Minor*, 11 Ves. 559, and *Twig v. Fifield*, 13 Ves. 518, which have been practically overruled by the cases of *Anson v. Towgood*, 1 Jacobs & Walker, 637, and *Vesey v. Ellwood* 3 Drury & Warren, 77; see also *Fry* on Spec. Perfor. p. 264, and *Brady v. Keenan*, 6 P. R. 262.

Plumb for infants.

R. M. Fleming, for the purchaser, relied on *Ex parte Minor* and *Twig v. Fifield*, above quoted.

THE REFEREE—*Held* that the interest contracted for passed to the purchaser on the signing of the agreement to purchase; and that the cases of *Ex parte Minor*, &c., were overruled by the later cases.

Blake, V.C.]

[December.

CAMPBELL V. CAMPBELL.

Partition—Commission under G. O. 641—Discretion of Master as to disbursements.

This was a partition suit under G. O. 641. The property sold for \$2400. The plaintiff was entitled to six-eighths of the net proceeds, and two infants to one-eighth each. The total commission amounted to \$199.15, which the Master divided in the following proportions, viz.:—Seven-eighths to the plaintiff, and one-eighth to the guardian.

The Master also fixed the disbursements, which were not revised.

The guardian for the infants appealed from the order of the Master on the following grounds:—1. That one-eighth of the total commission was too little compensation. 2. That the disbursements ought to be revised.

Hoskin, Q.C., for appellant.

Hoyle, for the plaintiff, contended that under G. O. 643 the division of the commission among the solicitors of the different parties was entirely in the discretion of the Master; and that under G. O. 640 and 643 only actual disbursements were allowed, and, consequently, no revision was necessary.

BLAKE, V.C., allowed the appeal on both grounds, holding that a Judge in Chambers

might properly review the distribution of compensation made by a Master; that the question as to what are or are not disbursements is a very difficult one, and these bills should still be referred as ordinary ones to the Master in Ordinary for revision.

MASTER'S OFFICE.

Taxing Officer.]

[October.

JACKSON V. HAMMOND.

Proper parties by bill—Mechanics' Lien Acts—Costs.

The plaintiff Jackson was mortgagee of the lands in question, the defendant Hammond and the other defendants being the holders of liens registered under the Mechanics' Liens Act against the premises.

The bill was an ordinary mortgage bill for sale, but contained the following allegations as to the lien holders: "The defendants, John Anderson and others have lately filed in the Registry Office, in and for the County of Huron, statements of their respective claims of liens to which they claim to be entitled under the Mechanics' Lien Act, by virtue of doing work upon, and furnishing material in the erection of a certain house upon the said lands. The said mortgage to the plaintiff was executed and duly registered in the Registry Office in and for the County of Huron, before the commencement of the work done, or the placing of the materials aforesaid upon the said lands, in respect whereof the defendants, John Anderson and others claim such liens as aforesaid."

MR. THOM (Taxing Officer) *held*, on revision of taxation of plaintiff's costs, that the lien holders should not have been made parties by bill, but should have been added as parties in Master's Office, after decree, by notice T.

This ruling was subsequently approved of by BLAKE, V.C., and PROUDFOOT, V.C.

LAW STUDENTS' DEPARTMENT.

LAW STUDENTS' DEPARTMENT.

We continue the publication of the Law Society's Examination Questions:—

SECOND INTERMEDIATE.

Leith's Blackstone, Greenwood on Conveyancing.

1. What portions of the English law are in force in this Province?
2. What is the comprehensive legal signification of the term *land*?
3. What is an advowson, and what are the various kinds?
4. State shortly some of the most notable features of the feudal system.
5. What do you understand by the expression in reference to estates in land that holders have not *allodium*?
6. What were the natures of the tenures in knight-service, fee socage and villien socage?
7. Give the rules of descent among collaterals as at common law.

Snell's Equity—Stat. Can., 29 Vict. cap. 28.

1. "*Equity imputes an intention to fulfil an obligation.*" Explain this maxim. What chief doctrines of equity find their places under this maxim?
2. Discuss the question, "What consideration is sufficient in equity to rebut a resulting use?"
3. In how far is the purchaser of the personality of a testator from the executor exonerated from misapplication of the proceeds by the executor?
4. Define reconversion.
5. In what respects does a mortgage of personality differ from a pledge?
6. Under what circumstances will Court of Equity decree specific performance of a partnership agreement?
7. Under what circumstances will Court of Chancery relieve against forfeiture for breach of a covenant in a lease to insure against fire? Give reasons for answer.

EXAMINATION FOR CALL.

Best on Evidence—Smith on Contracts—Blackstone, Vol. 1.

1. What are, according to Mr. Best, the chief abuses to be guarded against by the legislator in dealing with judicial evidence?
2. What is the rule at Common Law as to the admissibility in evidence of the husband

and wife of a party to a suit? How is this varied by statute? Explain fully.

3. Discuss the question whether counsel in a cause can be sworn as a witness (a) on behalf of his client, (b) on behalf of the other side.

4. Distinguish as to the effect of self-serving statements made (a) under a mistake of fact, (b) under a mistake of law. By whom may such statements be made?

5. Explain, after Mr. Smith, what is meant by the expression "Policy of the law" as used in connection with the question of validity of contracts.

6. If an agreement entered into between two persons is subsequently avoided on the ground of fraud how will this affect (a) the parties to the agreement, (b) third parties who have acquired rights under the agreement before its avoidance?

7. With what restrictions must the rule be taken that the principal may declare himself and take advantage of his agent's contract made without naming him?

8. A employs B to carry a bale of goods from Toronto to Oshawa, and on the way B sells them to C, who pays for them. Define shortly the rights and liabilities of the various parties.

9. What powers had the Crown apart from statute (1) as to forbidding a subject to leave the Kingdom, (2) as to compelling him to leave?

10. Define the power and jurisdiction of the Parliament of Great Britain according to Blackstone, mentioning any limitation to which it is subject.

Stephen on Pleading—Byles on Bills—Common Law pleading and practice—The statute law.

1. Explain the method by which issues in law are arrived at and tried in our Common Law Courts.

2. What is meant by a *judgment non obstante veredicto*? Under what circumstances may it be obtained? By what other name is it called, and why?

3. To a declaration on an indenture of covenant a plea of release is pleaded and to it a replication of duress. What facts are in issue and what stand confessed on such a record? Refer to any general rules given by Mr. Stephen which are called in requisition in arriving at your answer.

4. What is the rule as to pleading acts valid at Common Law, but regulated as to mode of performance by statute? Illustrate your answer by an example.

5. What is the effect of persons who fill official situations signing promissory notes

LAW STUDENTS' DEPARTMENT.

on which they describe themselves in their official capacity?

6. What are circular notes and letters of credit, and what liability is incurred by the issuer of the same?

7. What is the effect on a bill or note of part of the consideration being fraudulent or illegal? What would be the effect in case of a renewal of the note for the whole amount or in part? Explain fully.

8. A is holder of a dishonoured bill, and receives other bills for the sum due the old bill remaining in his hands: state fully the effect of this transaction.

9. Sketch shortly the practice with respect to references to Masters in Chancery from Common Law Courts, including the report and the methods of appeal from such report.

10. State accurately the changes that have been made by statute in the former right of the parties to a Common Law action to have all issues in fact tried by a jury.

Taylor's equity—Lewis' equity pleadings—Pleading and practice.

1. What was, in Equity, and what is now the law as to employing puffers at auction sales?

2. Will agreements among persons attending a sale not to bid against one another vitiate the sale? Answer fully.

3. Distinguish between the relationships of solicitor and client, and guardian and ward, as to the validity of dealings between the parties so related. State the position of the parties accurately.

4. State with particularity the steps necessary to bring on a case for re-hearing.

5. Give in detail the usual course of proceeding in mortgage cases (1) where there are subsequent encumbrances, (2) where there are none.

6. What is the present law as to the necessity of pleading equitable defences in an action at law? Give the effect of any recent statute upon the subject.

7. What special statutory mode is there for enforcing payment of money ordered to be paid to a plaintiff in an alimony suit?

8. An answer neither traverses nor confesses and avoids the plaintiff's bill. What course should the plaintiff adopt? Explain.

9. A wife joins with her husband in a mortgage upon certain real estate. Are you aware of any reason why it seems to be now proper to make the wife a party to a bill to foreclose the mortgage filed during the life of the husband?

10. In what form is a partial demurrer to a bill filed?

Dart on Vendors and Purchasers.

1. Three parties were seized of land which was acquired and held for partnership purposes. After the death of one partner it becomes necessary in winding up the estate to sell the land. Who are the necessary parties to the conveyance?

2. A mortgagee having sold the mortgaged land under a power of sale contained in the mortgage, has in his hands, after paying the mortgage debt, a certain surplus to which there are various and conflicting claims. What course would you advise him to pursue?

3. There may be contracts with reference to land upon which actions at law may be successfully maintained, but of which a court of equity will not decree specific performance. Give an example and explain the principle.

4. Under what circumstances can evidence be given of verbal declarations made at an auction sale which are inconsistent with the written conditions? Is there any distinction as to such admissibility between an action at law and a suit for specific performance? Answer fully.

5. What is the method suggested by Mr. Dart as the most convenient plan of perusing abstracts?

6. Will inadequacy of consideration in any case form a sufficient defence to a bill for specific performance? Explain.

7. What is the distinction between wills and conveyances *inter vivos* with regard to their impeachment upon the ground of undue influence?

8. What are the tests for determining whether precatory words do or do not create a trust?

9. What is nuncupative will? What, generally, were the provisions of the Statute of Frauds respecting them? What is now the law?

10. What circumstances were formerly and what are now (apart from cancellation) sufficient to revoke a will?

Professional Courtesies.

To the Editor of THE LAW JOURNAL.

SIR,—Does a student in doubt as to any question of law presume too far, or deserve to be treated with contumely, when he applies to a senior in years and experience for advice?

REVIEW—CORRESPONDENCE.

The enquiry is suggested by an incident which occurred in Osgoode Hall, at the Scholarship Examination, lately. A question arose and opinions differed. One of the students at the request of the others, approached a learned Q. C. hailing from the Ambitious City. He stated his question and how it arose. His Q.C.'ship answered, as an Irishman does, by a question, whether his enquirer came from the country, or had not learned better than to seek information for nothing, and then, did not stay for an answer. Do students deserve such treatment from those to whom they look for at least ordinary courtesy in such matters?

Yours &c.,

A STUDENT.

[We can hardly suppose that the Q. C. knew that the person seeking information was a student asking a *bona fide* question. If he was aware, however, of that fact, we can only in charity suppose that he did not feel competent to answer the question and had not moral courage to say so. There are a few Q. C.'s of that sort in Canada. Eds. L. J.]

REVIEW.

THE DOMINION ANNUAL REGISTER AND REVIEW. Montreal : Dawson Eros, 1879.

This is a new publication edited by Mr. Henry A. Morgan, assisted by the Hon. Wm. Macdougall, C.B., Alex. M. Burgess, Dr. Robt. Bell, John Maclean, and John A. Phillips. Its design is to give to the politician, the journalist, the man of business and the student of history, in an accessible, though necessarily in a condensed form, information of an accurate and reliable character, touching the present political and domestic concerns of the Dominion and its several provinces. The intention is to publish a similar Register annually.

The book, which does not pretend to give any information prior to 1867, appropriately commences with a list of the delegates from the various provinces which culminated in Confederation. This is followed by a short summary of the political events from the 1st July, 1867 to the end of 1877. This is by way

of introduction, for we now come to a review of the political history of the Dominion for the year 1878 ; and we assume that a similar yearly review will be the main feature of each succeeding volume.

The general reader will be interested by the "Journal of Remarkable occurrences for the year 1878 ;" and it may here be remarked that there are remarkably few remarkable occurrences in our quiet-going Dominion which strike one as worthy of record, except in a local and personal sense. There will always be in such a journal as this, questions as to whether the selection is always the best that could be made ; but we venture to say that the task is one vastly easier to criticise freely than to do satisfactorily. We need only say that the editor has evidently sought to note the items which would be most interesting to the greatest number of readers.

The volume concludes with a sketch of the Vice-Regal reception in 1878, notes on scientific matters for the year, a business retrospect, public appointments, obituary, &c.

The surprise is, not that such a book as this is should be published, but that it was not published years ago. Mr. Morgan who has evidently taken up the subject with his usual industry and intelligence has conferred a favour on the public which doubtless will be fully appreciated.

CORRESPONDENCE.

Unlicensed Conveyancers.

To the Editor of THE LAW JOURNAL.

DEAR SIR,—I have a difficulty which I desire to bring before you and your readers for a solution. I presume it is useless for the profession to agitate for any restrictions upon the so-called "Conveyancers" that flourish in our land. Assuming this, the next question is whether lawyers are not as a rule too Quixotic in their treatment of this class. To explain my meaning more fully, I will in a few words describe the difficulty I have to meet with. I have been practising law for the last nine years in a country town. Besides myself there are

CORRESPONDENCE.

two other professional men, and three (at least) so called "conveyancers." Since coming here I have invariably charged three dollars for drawing an ordinary deed or mortgage. Not an outrageous charge you will admit. Our so called "conveyancers" charge \$1.50 for the same work. What is the consequence. The Registrar informs me that any one of these "conveyancers" draws in a year more conveyances than the three of us professional men put together. Now then, I think it is about time a stop was put to this. How? you will ask. My answer is, By doing the work for the same money. But some one replies. "By doing so, you lower the dignity of the profession." And here is where my difficulty arises. For nine years I have endeavoured to uphold the dignity of the profession at a great loss to myself, and the consequence has been that, instead of the profession being more dignified, it has suffered in reputation and dignity by its members being charged with a desire to collect more for their work than others are willing to do it for.

Of course we are well acquainted with the common charge made against these "Conveyancers" that their mistakes lead to a great deal of litigation. I very much doubt that the profession make more than they lose in this way. The special conveyancing in the country forms but a very slight proportion of the conveyancing done.

Now, sir, if you think this letter will do any good I would like you to publish it and if not I would like you to give me your views on the propriety of taking the bold step I have pointed out. By doing so you will much oblige,

Yours, &c.,

AN OLD SUBSCRIBER.

[This opens up a subject of a good deal of practical difficulty. It is one not felt to any appreciable degree in large cities. But the evil spoken of is well known in all country places. We feel some hesitation in expressing an opinion on the point. Men in other professions, physicians for example, have obtained from the Legislature a very stringent measure which practically gives a monopoly of all business in their line to re-

gistered practitioners. We see no difference in principle between their position and that of the legal fraternity. There is, however, a practical difference in this, that there is a large liberality of thought amongst the latter, and the reverse amongst the former. It would seem that Doctors, Registrars, Sheriffs and Official Assignees, can succeed in "lobbying" through the Legislature any measure which tends to their own advancement. Lawyers, however, devote their energies more to the interests of their clients than to their own and they do not seem to possess that cohesiveness which would be necessary to ensure success, were they to attempt similar legislation on their own behalf. This is a matter which in our opinion should engage the attention of the Attorney-General for Ontario, at the coming Session of the Local Legislature. There are lawyers enough in the House to carry some protective measure to the profession, even were it a less evidently just thing than in truth it is.

As to the propriety of taking the step suggested by our correspondent, we shall speak further hereafter. In the meantime, we shall be glad to hear the opinions of some of our subscribers, to whom the subject is one of considerable interest.]

ERRATUM.—An error crept into the letter from a correspondent signed "D. E. T." on the subject of composition and discharge published last month, the word "confirmation" being used instead of "consideration."

FLOTSAM AND JETSAM.

The following is a new way of answering an old question.

At an examination for admission to the bar, the question was asked. "What is the rule in Shelley's case?" One of the class answered: "The rule in Shelley's case is the same as in any other man's case. The law is no respecter of persons." We trust the possessor of the well-balanced mind that conceived this answer was promptly admitted.

LAW SOCIETY, TRINITY TERM.



Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 43RD VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

HENRY THEOPHILUS WARING ELLIS.
 PETER L. PALMER.
 GEORGE TATE BLACKSTOCK.
 ALEXANDER JACKSON.
 JAMES ALEXANDER WILLIAMSON.
 GEORGE R. WEBSTER.
 DUNCAN ARTHUR MCINTYRE.
 THOMAS W. CROTHERS.
 CHARLES W. MORTIMER.
 FRANK EGERTON HODGINS.
 JAMES MORRISON GLENN.
 CHARLES WESLEY COLTER.
 GEORGE CLAXTON.
 HUBERT L. EBBELS.
 ANGUS JOHN MCCOLL.

The names are given in the order in which they appear on the Roll, and not in the order of merit.

The following gentlemen were admitted as Students and Clerks.

Graduates.

JOHN YOUNG CRUICKSHANK.
 THOMAS ARTHUR ELLIOTT,
 JOHN CAMPBELL FERRIE BROWN.
 RICHARD SCOUGALL CASSELS.
 JOHN WALTER DELANEY.
 FREDERICK WILLIAM APLIN G. HAULTAIN.
 CHARLES COURSOLES MCCAUL.
 JOHN D. CAMERON.
 THOMAS P. CORCORAN.
 JOHN CARRUTHERS.
 JAMES CHISHOLM.
 GEORGE DAVIS.
 JOSEPH ALEXANDER CULHAM.

Matriculants of Universities.

JOHN FRANKLIN PALMER.
 JAMES DUNCAN S. C. ROBERTSON.
 WILLIAM STREET SEEVOS.

Graduate.

HENRY JAMES CAMPBELL.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articulated clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, *Fasti*, B. I., vv. 1-300; or,
 Virgil, *Æneid*, B. II., vv. 1-317.
 Arithmetic.
 Euclid, Bb. I., II., and III.
 English Grammar and Composition.
 English History—Queen Anne to George III.
 Modern Geography — North America and Europe.
 Elements of Book-keeping.

Students-at-Law.

CLASSICS.

- 1879 { Xenophon, *Anabasis*, B. II.
 { Homer, *Iliad*, B. VI.
 1879 { Cæsar, *Bellum Britannicum*.
 { Cicero, *Pro Archia*.
 { Virgil, *Eclog.* I., IV., VI., VII., IX.
 { Ovid, *Fasti*, B. I., vv. 1-300.
 1880 { Xenophon, *Anabasis*, B. II.
 { Homer, *Iliad*, B. IV.
 1880 { Cicero, in *Catilinam*, II., III., and IV.
 { Virgil, *Eclog.* I., IV., VI., VII., IX.
 { Ovid, *Fasti*, B. I., vv. 1-300.
 1881 { Xenophon, *Anabasis*, B. V.
 { Homer, *Iliad*, B. IV.
 1881 { Cicero, in *Catilinam*, II., III., and IV.
 { Ovid, *Fasti*, B. I., vv. 1-300.
 { Virgil, *Æneid*, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

LAW SOCIETY, TRINITY TERM.

ENGLISH.

A paper on English Grammar.
Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and
The Traveller.

1881.—Lady of the Lake, with special refer-
ence to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George
III., inclusive. Roman History, from the com-
mencement of the Second Punic War to the death
of Augustus. Greek History, from the Persian
to the Peloponnesian Wars, both inclusive.
Ancient Geography: Greece, Italy, and Asia
Minor. Modern Geography: North America
and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 }
and } Souvestre, Un philosophe sous les toits.
1880 }

1879 }
and } Emile de Bonnechose, Lazare Hoche.
1881 }

or GERMAN.

A Paper on Grammar.

Musæus, Stumme Liebe.

1878 }
and } Schiller, Die Bürgschaft, der Taucher.
1880 }

1879 } { Der Gang nach dem Eisen-
and } hammer.
1881 } { Die Kraniche des Ibycus.

A student of any University in this Province
who shall present a certificate of having passed,
within four years of his application, an exami-
nation in the subjects above prescribed, shall be
entitled to admission as a student-at-law or
articled clerk (as the case may be), upon giving
the prescribed notice and paying the prescribed
fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Inter-
mediate Examination, to be passed in the third
year before the Final Examination, shall be :—
Real Property, Williams; Equity, Smith's Manual;
Common Law, Smith's Manual; Act re-
specting the Court of Chancery (C.S.U.C. c. 12),
C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Inter-
mediate Examination to be passed in the second
year before the Final Examination, shall be as
follows :—Real Property, Leith's Blackstone,
Cnwood on the Practice of Conveyancing

(chapters on Agreements, Sales, Purchases,
Leases, Mortgages, and Wills); Equity, Snell's
Treatise; Common Law, Broom's Common Law,
C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16,
Statutes of Canada, 29 Vic. c. 28, Administra-
tion of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduc-
tion and the Rights of Persons, Smith on Con-
tracts, Walkem on Wills, Taylor's Equity Juris-
prudence, Stephen on Pleading, Lewis's Equity
Pleading, Dart on Vendors and Purchasers,
Best on Evidence, Byles on Bills, the Statute
Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the
preceding :—Russell on Crimes, Broom's Legal
Maxims, Lindley on Partnership, Fisher on Mort-
gages, Benjamin on Sales, Hawkins on Wills,
Von Savigny's Private International Law (Guth-
rie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's
Mercantile Law, Taylor's Equity Jurisprudence,
Smith on Contracts, the Statute Law, the Plead-
ings and Practice of the Courts.

Candidates for the Final Examinations are
subject to re-examination on the subjects of the
Intermediate Examinations. All other requisites
for obtaining Certificates of Fitness and for Call
are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I.,
Stephen on Pleading, Williams on Personal
Property, Hayne's Outline of Equity, C. S. U. C.
c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year. — Williams on Real Property, Best
on Evidence, Smith on Contracts, Snell's Treatise
on Equity, the Registry Acts.

3rd Year. — Real Property Statutes relating to
Ontario, Stephen's Blackstone, Book V., Byles
on Bills, Broom's Legal Maxims, Taylor's Equity
Jurisprudence, Fisher on Mortgages, Vol. I. and
chaps. 10, 11, and 12 of Vol. II.

4th Year. — Smith's Real and Personal Property,
Harris's Criminal Law, Common Law Pleading
and Practice, Benjamin on Sales, Dart on Ven-
dors and Purchasers, Lewis's Equity Pleadings
Equity Pleading and Practice in this Province.

The Law Society Matriculation Examinations
for the admission of students-at-law in the Junior
Class and articled clerks will be held in Janu y
and November of each year only.

DIARY—CONTENTS—EDITORIAL NOTES.

DIARY FOR JANUARY.

1. Thur..New Year's day.
2. Frid ..Christmas Vacation in Court of Appeal ends.
4. Sun. ..Second Sunday after Christmas.
5. Mon. ..Hear and Dev. Sitt. and County Court Term begin. Municipal Elections held.
6. Tues. ..Toronto and Hamilton Assizes. Christmas Vacation in Chancery ends.
8. Thur..Christmas Vacation in Exchequer Court ends.
10. Sat. ..Christmas Vacation in Supreme Court ends. County Court Terms end.
11. Sun. ..First Sunday after Epiphany.
12. Mon....Sir Chas. Bagot, Gov.-Gen., 1842.
13. Tues...Court of Appeal sittings begin.
18. Sun. ..Second Sunday after Epiphany.
19. Mon..First meeting Municipal Councils, exclusive County Councils.
20. Tues. ..Hear and Dev. Sittings end. First meeting County Councils. §
25. Sun. ..Septuagesima Sunday.

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Canada Law Journal.

Toronto, January, 15, 1880.

The Supreme Court of California has lately imprisoned an attorney for contempt of Court, because he refused to defend a prisoner, without compensation, after being requested so to do by the Court.

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With this number our readers will receive the Index for last year and the Sheet Almanac. The latter was kept back in the belief that a change was anticipated in the days for the Law Society Examinations in accordance with the notice of Mr. Hodgins. No change has, however, as yet been made.

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"Not" is a very important word, as the Courtiers of Charles II. rightly thought when they proposed to strike it out of the Seventh Commandment. It is a very awkward word, however, when it is inserted where it should not appear. This is the case in the head-note to *Re Ford*: 7 Pr. R. 457 where it is said that the surviving executor could *not* make a good title, whereas the Vice-Chancellor came to the opposite conclusion. We are informed that this was the printer's error in the first place, and will be noted by the reporter in the subsequent number.

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In our October number we called attention to a gross breach of professional ethics on the part of an attorney in London. We have not yet heard of any enquiry having been made, or any action taken by the Benchers of the Law Society. If we understand the feeling of the profession aright, that body, now elected by their brethren at large, is looked to to express some opinion on the subject. We are satisfied

EDITORIAL NOTES—LEAP YEAR.

that *individually* they would not countenance conduct which would seem to come within the ruling of Chief Justice Draper as "unprofessional and illegal."

We recently stated that Mr. Barron was about to publish a book on the law of Bills of Sale and Chattel Mortgages. Two other law books are also announced by Carswell & Co.:—The Surrogate Courts Act, with the Rules and Forms, together, with notes by Mr. Howell—and an annotated edition of the Registry Act, by Mr. E. H. Tiffany. The subjects which are to be discussed by these gentlemen are of a very practical nature; the result will, we hope, prove valuable additions to the increasing list of Canadian law books.

Mr. O'Sullivan has issued a Manual of Government in Canada, which we shall notice hereafter.

Apropos of the recent contempt of Court case in which Mr. A. and Mr. B. figured, and considering the dignified and well-timed rebuke which the Chancellor administered, it is somewhat ludicrous to contrast the manner of converse which obtained among great and good men not long ago. We quote from Leslie Stephen's life of Dr. Johnson (a book by the way which every one should read). Adam Smith met Johnson at Glasgow, and had an altercation with him about Hume's death. The dispute ended by Johnson saying to Smith, "*You lie.*" "And what did you reply?" was asked of Smith. "I said, 'you are a son of a ———.'" On such terms, says Scott, "did these two great moralists meet and part, and such was the classical dialogue between these two great teachers of morality. We trust, however, that the aggressor in the Osgoode Hall will not look upon this as condoning his offence.

As we go to press we receive a copy of a draft Bill prepared by Attorney General Mowat, as the proposed foundation of "an Act for Consolidating the Superior Courts of Law and Equity; establishing a uniform system of pleading and practice therein; and making further provision for the due administration of Justice." It is stated to be printed for consideration only. A hurried glance would seem to show that it is based on the English Judicature Act, adapted to the peculiarities of our Courts; and besides various new provisions, weaves into the altered practice, such portions of our present practice as would seem applicable. As rumours of some such measure have been rife for some time, we may assume that much thought has been given to it by the Attorney General. At the same time, if it is intended to pass the Act this Session, we should regret that more time has not been given to the profession for the consideration of so sweeping a change. It would be much better to receive suggestions before the passing the Act than to make changes afterwards. In short, it is more desirable to "tinker" at a Bill than an Act.

LEAP YEAR.

One of the peculiarities in the law relating to Leap Year is, that though it contains 366 days, it is no longer than if it contained the usual number. In other words, the last two days of February are by force of an old statute rolled into one. The statute in question is 21 Hen. III, according to the old copies of the law, but is more correctly given in the English Revised Statutes as 40 Hen. III. (A.D. 1256). It is there enacted that the day increasing in the Leap-Year shall be taken and reckoned of the same month wherein it groweth, and that that day

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and the next day going before shall be accounted for one day. In effect, then, the 29th of February is not to be included in the computation of legal time. Upon the effect of the statute, see *Rex v. Worminghall*, 6 M. & Sel. 351. There seems no reason to doubt that this Act has been incorporated with our Provincial law as part of the law of England in force when we adopted that system. But we are not aware of any cases in Canadian Courts actually deciding this. On the contrary, the head-note of a case in 4 Prac. Rep. would imply that the 29th of February would be reckoned—but the judgment does not seem to bear out the headnote.

SIR EDWARD COKE.

"The Institutes of the Laws of England" is a book now but little read by students of the law, although the title page bears the words, "Authore Edwardo Coke, Milite, J.C." In this paper we propose to give the results of a holiday ramble through the pages of the third part, "concerning High Treason and other Pleas of the Crown and Criminal Causes," shewing the treasures of wit, wisdom, piety, and literature, picked up here and there.

In the proem we are told that the former volumes of Coke's great work concerned chiefly, "common pleas and these two great pronouns *meum* and *tuum*," while in the book under consideration he treats *de malo*. "A worke arduous and full of such difficultie as none can either feele or believe, but he onely that maketh tryall of it. And albeit it did often terrifie" him, yet the love and honor of his country prevailed upon him "to passe through all labours, doubts, and difficulties: and thereby he opened such windowes, and made them (the Lawes of England) so lightsome and easie to be

understood, as he that hath but the light of nature, (which Solomon calleth the candle of the Almighty God, Prov. 20, 17), adding industrie and diligence thereunto, may easily discern the same." The gallant knight was not over-diffident, but then his knowledge of the law really "was exhaustive and complete: he knew all the law of his time." Law books then were few and far between: there were only twelve volumes of reports in existence.

What strikes the reader most is Coke's fondness for quoting Scripture, and exhibiting his knowledge of Latin, his curious learning, his philosophical reflections and his poetic effusions. Latin and Holy Writ are to be found on the first page and on the last, and on well nigh every intermediate one. His title page, besides containing the words of Eccles. 8, 11, from the Vulgate, has the maxim, "*Inertis est nescire quod sibi liceat*;" the list of chapters is headed by the wise-saw "*Multi multa, nemo omnia novit*;" the "proeme" has a dedication, "*Deo, Patriæ, Tibi*;" throughout the text Scriptural phrases, Biblical references, classical quotations, are as thick as the leaves on Vallombrosa; while the epilogue, after an expression of thankfulness that by "the goodness of Almighty God, *per varios casus, per tot discrimina rerum*," he had brought his work to a conclusion, ends with the ascription, "*Deo gloria, et gratia. Amen*." No—no, we mean "*Finis*."

That Coke—to adopt his own maxim—knew "many things" in law, history, poetry, philosophy, theology, and philology, is obvious from every line; that he did not know "everything" is almost equally patent from every page.

In his private life Coke "seems to have been sincerely and humbly religious, his last words being, 'Thy Kingdome come, Thy will be done!'" This trait

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is clearly evident in the book we are looking at, it runs through it as a silvery thread. Where writing on Petit Treason, he contrasts the conduct of Radamanthus, "that cruell judge of hell," of whom Virgil saith :—

Castigatque, auditque dolos, subigitque fateri,
(First, he punished before he heard, and when he has heard his denial, he compelled the party accused by torture to confesse it), "with that of the Almighty, which he says, is far otherwise—1. *Vocat.* 2. *Interrogat.* 3. *Judicat.* And as authority for this statement he refers to Luke xvi. 1, 2, John vii. 51. In concluding the chapter he says, "It appeareth in the Holy Scripture, that traytors never prospered, what good soever they pretended, but were most severely and exemplarily punished: As Corah, Dathan, and Abiram, by miracle: *dirupta est terra sub pedibus eorum, et aperiens os suum devoravit illos.* Athalia, the daughter of Amri, *interfecta est gladio.* Bagatha and Thara against Assuerus, *appensus est uterq; eorum in patibula.* Absolon against David. *Suspensus in arbore, et Joab infixit tres lanceas in corde ejus.* Achitophel with Absolon against David. *Suspendio interijt,* he hanged himselfe. Abiathar, the traiterous high priest against Solomon. *Abiathar sacerdoti dixit rex, &c. Et quidem vir mortis es, sed hodie te non interficiam, &c. Ejecit ergo Solomon Abiathar, ut non esset sacerdos.* Shemei against David, *gladio interfectus.* Zimri against Ela, who burnt himselfe. Theudas (*qui occisus est, et circiter 400 qui credebant ei, dispersi sunt et redacti ad nihilum*) and Judas Galilæus, *ipse perijt, et omnes quotquot consenserunt ei, dispersi sunt.* Lastly, Judas Iscariot, *secundum nomen ejus vir occisionis,* the traytor of traytors. *Et hic quidem possedit agrum de mercede iniquitatis suæ, & suspensus crepuit medius, et diffusa sunt omnia visera ejus."* And, therefore, let all men abandon it

(treason) as the most poisonous bait of the devill of Hell, and follow the precept in holy scripture. Fear God, honour the king, and have no company with the seditious."

Very religious is Sir Edward when he treats of felony by conjuration, witchcraft, sorcery or enchantment, "Thou shalt not suffer a witch to live. *Non est augurium in Jacob, nec divinatio in Israel,*" is in the text, while in the margin he refers, concerning "these devilish and wicked offenders," to Exod. ca. xxii., 17; Deut. ca. xviii., 10, 11, 12; Num. ca. xxiii., 23; 1 Reg. ca. xv., 23. "And it appeareth by our ancient books (*The Mirror, Britton and Fleta,*) that these horrible and devilish offenders which left the ever living God and sacrificed to the devil, and thereby committed idolatry, in seeking advice and aide of him, were punished by death." Burning was anciently the punishment. "The holy history hath a most remarkable place concerning the reprobation and death of King Saul, '*Mortuus est ergo Saul propter iniquitates suas, eo quod prævaricatus sit mandatum Domini, et non custodierit illud, sed insuper Pythonissam consuluerit, nec speraverit in Domino, propter quod interfecit eum, et transtulit regnum ejus ad David filium Isai.*'" David, we are told, killed Uriah with his pen. "The law concerning deodands is grounded upon the law of God. Exodus ch. ii., 28 *Si bos cornu percusserit virum aut mulierem, et mortui fuerint, lapidibus obruetur.*' He points a moral by quoting from the Vulgate the stories of Diana and Hemor, Ammon and Thamar.

His remarks on the subject of Prophecies might be read with advantage by Dr. Cumming, the Adventist and others of that ilk. "Certaine] it is, that to fortell of things to come, is a prerogative appropriated to the Holy Ghost; and that the devill

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cannot *prædicere*, foretell of things to come, which notwithstanding, S. Austin did sometime hold that he could. But afterwards justly retracted it in these words, *Rem dixi occultissimum audacioræ assertionis, quam debui, &c., certissimum est dæmones non præscire*. "Now for the predictions and foretellings of the Sibyls being Gentiles, so long before the incarnation of our Saviour Christ; and more directly and particularly, of those high mysteries of the incarnation and passion of Christ, the coming of Antichrist, the subversion of Rome, and the end of the World, they are by the true prophets of Almighty God, who spake by the Holy Ghost, well discovered; that while the church was in her cradle, these predictions were invented and fathered upon the Gentiles; to the intent to make the doctrine of the said high mysteries of the gospel the more credible amongst the Gentiles. And if any such predictions had been by the said Sibyls, out of question those great lights of nature amongst the Gentiles, Plato, Aristotle, Theophrastus, or some other of those great philosophers, that with great alacrity dived into the secrets of all kinds of learning, would have found them out, and made some mention of them. But besides the said discovery, such predictions by the Gentiles and heathen persons are against the word of God. (Eph. iii. 9; Col. i. 26.)

"Also predictions either of the time or end of the world, or that it is at hand, is not lawfull. For the first, see the first of the Acts, It is not for us to know the times and seasons which the Father hath put in his own power, &c. For the second, see the second epistle to the Thessalonians, I beseech you brethren, &c., that you be not shaken in mind, or troubled, &c., as though the day of Christ were at hand, let no man deceive you by any means.

"We have the rather said hereof thus much, for that we have heard divers men boldly and confidently upon their numerall calculations to have erred herein."

"Usury," he says, "is directly against the law of God."

"Monopolies," we are told, are "against the ancient and fundamental laws of this Kingdom. And the law of the realm on this point is grounded upon the law of God, which saith, *Non accipies loco pignoris inferiorem et superiorem molam, quia animam suam apposuit tibi*. Thou shalt not take the nether or upper milstone to pledge, for he taketh a man's life to pledge: whereby it appeareth that a man's trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a man's trade taketh away his life, and therefore is so much the more odious, because he is *vir sanguinis*. Against these inventors and propounders of evil things, the Holy Ghost hath spoken, *inventores malorum, &c. digni sunt morte*."

"*Mendicus non erit inter vos*, there shall be no beggar among you. Deut. xv., v. 4. Of Apparel he says, *Non induetur mulier veste virili, nec vir utetur veste fæminæ: abominabilis apud Deum, qui facit hoc*."

Embring days, we are told, are so called because in former days when they fasted they put ashes or embers on their heads. Job ii. 12, Jer vi. 26, 2 Sam xiii. 19. "And as the naturall conversion of the flesh of the body is to dust so the sins of the soul (unrepented) are turned to fire. And this was shadowed under embers, that ever keep fire." He then wanders off to explain the meaning of Quadragesima Sunday, Quinquagesima, Sexagesima and Septuagesima. Then he returns to the subject of Diet and says, "But there is no act of parliament against excesse of diet, for it is known to be so hurtfull for man's body, and so obscureth the faculties of the mind, as the understanding, memory,

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&c. as to men, specially to Christian men, there needeth no law at all to be made, ever being mindfull of that caveat '*Attende autem vobis, ne forte graventur corda vestra in crapula, et ebrietate, &c.*' and to shew that "morall heathen men by the light of nature agree hereto," he quotes Cicero and Horace, two gentlemen who, by the way, by no means despised good living.

Apropos of building he cites Deut. xxii. 8, to shew that battlements should be built around the roof of a house for the purposes of safety.

He approved strongly of funereal monuments and says that the erection of them is lawful, "for it is the last work of charity that can be done for the deceased, who while he lived was a lively temple of the Holy Ghost, with a reverend regard, and Christian hope of a joyfull resurrection." And that they serve the good use and end of putting the living in mind of their end for all the sons of Adam must die. (Then comes the inevitable Latin.)

Statutum est hominibus semel mori.

Cum tumulum cernis, tum tu mortalia spernis:

Esto memor mortis, sisque ad coelestia fortis.

In chapter 99 our author waxes eloquent "De Assentatione, Fucologia, Pseudologia, Flattery," he says, "The occasion of making this law was, that king Canutus had been seduced by flatterers, who had shewed him his face and state in a false glasse, making too great a shew of his own parts, actions, and state, to the end to make him conceit himselfe to be better and greater than he was, and his adversaries lesse, then in truth they were. Nay, this king by wicked flatterers assumed to him divine power and honour; for coming from sea, he set his feet on the sea strand, as the sea was flowing, and com-

manded the sea not to rise to wet his lordly and majestick feet nor clothes: the sea keeping on his accustomed course, both wet his feet and thighs also: whereat being sore amazed repented his presumption (which he had undertaken by wicked flattery.) And well is the flatterer marshalled in this law with lyers, thieves, and raveners; for the divine described flatterers to be those, *Qui colunt aliquem, et auferunt ab eo aliquid temporarii boni*. So as it is *peccatum viscatum*, it getteth away much and giveth smoke. And the Holy Ghost hath styled flattery *oleum peccatoris*, that is, the oile of the sinner, that is, of him that exceedeth others in sinne, and doth affect greatness, that is the head, making it greater and more prosperous then it is, as you may reade in the prophet David: *Corripiet me justus in misericordia, et increpabit me, oleum autem peccatoris non impinguet caput meum*. Whereby he being both a king and a prophet, preferreth the reproofe, nay the sharp rebuke of the just and virtuous, before the smooth humouring of the flatterer (per nomen) of the sinner. This *oleum peccatoris* is *mel venenatum, et venenum mellitum*, and commonly affecteth greatnesse, and is called lordbane.

And again, David speaking of the flatterer saith, his words are smoother then oile, and yet they are very swords. *Hæc dicit Dominus Deus, Væ qui consueunt pulvillos sub omni cubito manus, et faciunt cervicalia sub capite universæ ætatis ad capiend' animas, &c.* Thus saith the Lord God, Woeto them that sow pillowes under all armeholes, and put kerchifes upon the heads of every age to hunt soules. They make the king glad with their wickedness, and the princes with their lyes. *In malitia sua latificaverunt regem, et in mendaciis suis principes.*

The flattering mouth worketh ruine. And more kings and kingdomes have been overthrown by the means of flattery,

SIR EDWARD COKE—ARCHITECTS' FEES.

then by publick hostility. And this is the cause that we have mentioned the said ancient law for their punishment, they be lawfully banished from princes' courts, and subjects' houses.

Ut videat cæco sit simia præda leoni:
Rex cæcus cernit, cum sycophanta perit."

He justifies the cruel punishment for High Treason, the drawing, hanging, beheading, embowelling, &c., by reference to Holy Writ as follows: "Implied in this judgment is, first, the forfeiture of all manors, lands, tenements, and hereditaments in fee-simple, or fee-tail of whomsoever they be holden. Secondly, his wife to lose her dower. Thirdly, he shall lose his children (for they become base and ignoble.) Fourthly, he shall lose his posterity, for his blood is stained and corrupted, and they cannot inherit to him or any other ancestor. Fifthly, all his goods and chattels, &c. And reason is, that his body, lands, goods, posterity, &c., shall be torn, pulled asunder, and destroyed, that intended to tear, and destroy the majesty of government. And all these severall punishments are found for treason in Holy Scripture.

1 Reg. ii. 28, &c. *Joab tractus, &c.*

Esther, ii. 22, 23. *Bithan suspensus, &c.*

Acts, i. 18. *Judas suspensus crepuit medius, et diffusa sunt viscera ejus.*

2 Sam. xviii. 14, 15. *Infixit tres lanceas in corde Absolon cum adhuc palpitaret, &c.*

2 Sam. xx. 22. *Abcissum caput Sheba filii Bichri.*

2 Sam. iv. 11, 12. *Interfecerunt Baanan et Rechab, et supenderunt manus et pedes eorum super piscinam in Hebron.*

Corruption of blood, and that the children of a traitor should not inherit, appeareth also by Holy Scripture.

Psal. cix. 9, 10, 11, 12, 13. *Mutantes transferentur filii ejus, et mendicent, et*

ejiciantur de habitationibus suis, et diripient alieni labores ejus, et dispereat de terra memora ejus."

Thus much to prove Coke's fondness for indulging in Scripture words and citing scriptural authorities, and indulging in pious reflections.

(To be continued.)

SELECTIONS.

ARCHITECTS FEES.

In the case of *Footner v. Joseph*, nearly twenty years ago, the Court of Queen's Bench held that an architect suing for a commission, though no express agreement be proved, may establish the value of his services and recover as for a *quantum meruit*. The Court may adopt a commission as a convenient mode of remuneration, but not because an architect is by law entitled to a commission on the outlay. The case was very clearly put by the late Mr. Justice Aylwin: "It would be dangerous," he said, "to suppose that architects could establish their own tariff of prices within their own guild, and thus tax their own bills. That could not be sustained, and if the Court now adopted the standard of 2½ per cent, it was not because there was no proper evidence to show what was the value of the plaintiff's services. It was, therefore, necessary to take the evidence given, which seemed to establish 2½ per cent. as a fair remuneration. But he did not subscribe to the doctrine, that because a building costs £20,000, the architect was to have a certain percentage on that sum, on account, perhaps, of the introduction of a number of foreign novelties and luxuries, which in no way increased his responsibility or labour. His business was to see that the house was properly constructed, and the mere expenditure could form no basis of the value of his services. He agreed with the judgment because it did not adopt that basis." (5 L. C. J. 226.) The case of *Roy v. Huot et al*, before Mr. Justice Torrance, noted in this issue, is very much like that of *Footner v. Joseph*, and was decided in accordance with the principle there laid down.—*Legal News*.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL

[December 1, 1879.

MAXWELL, V. THE CORPORATION OF THE
TOWNSHIP OF CLARKE.

Contributory negligence.

On one side of a travelled road, which the defendants were bound to keep in repair, was a declivity, down which a pile of wood, composed of blocks cut in two-foot lengths, had been thrown by a person living near the highway, and allowed to remain for about three weeks. Some of the wood was upon the bed of the road, but a portion, estimated at from 21 to 26 feet, was free from obstruction. The road itself was not defective.

In passing this pile of wood, on his way to a neighbouring village, the plaintiff's horse, which was a quiet one, shied, but no accident occurred. Returning, a short time after, at a canter, but holding a close rein, the plaintiff was thrown off by his horse, which again shied at the wood. The plaintiff swore that the wood had "interfered with his travelling when riding another beast."

Held, on appeal from the County Court of the United Counties of Northumberland and Durham, that the defendants were not guilty of a breach of the statutory duty to "keep in repair" the road; and a non-suit was therefore directed to be entered in the Court below.

Per PATTERSON, J.A., that the findings (i.) that this place was a place of danger, and (ii.) that the plaintiff was not guilty of contributory negligence in allowing his horse to canter past were inconsistent.

J. K. Kerr, Q.C., and D. B. Simpson, for plaintiff.

E. Douglas Armour, for defendants.

QUEEN'S BENCH.

IN BANCO, MICHAELMAS TERM,
DECEMBER 27, 1879.

IN RE GILCHRIST AND THE CORPORATION OF
THE TOWNSHIP OF SULLIVAN.

By-law—Defects on face of—Validity—Practice.

Held, that although it appeared on the face of the by-law that the last instalment of principal and interest due under certain debentures issued by a municipal corporation would be payable beyond twenty years from the date at which the by-law was to come into force, the by-law was, nevertheless, good, as the provision in question must be considered as controlled by the preceding one, which made the debentures payable in twenty years at furthest from the day appointed for the by-law to take effect.

The by-law showed the whole ratable value of the property of the municipality to be \$668,293, and directed a rate of three and nine-tenth mills in the dollar, which it appeared would produce about \$150 less than the total amount of the debt to be incurred. *Held*, no objection to the by-law.

The Court refused to receive affidavits in support of the rule produced by counsel for the first time on the return thereof.

MacLennan, Q.C., and Moss in support of the rule.

J. K. Kerr, Q.C., contra.

MARY ARMSTRONG, ARCHIBALD LITTLE, and
JAMES ROBINSON, EXECUTORS, v. ROBERT
G. ARMSTRONG, EXECUTOR.

Executor de son tort—Action against—Administrator.

An action will not lie against a party as executor *de son tort* when there is a legally appointed administrator of the estate, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased.

Ritchie for plaintiff.

Delamere contra.

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CANTY V. CLARK ET AL.

Work and labour—Agreement to pay according to certificate of engineer.

Defendants agreed with plaintiff to pay him for certain work to be done by him according to the certificate of the engineer of a railway that the work had been fully completed, and not otherwise. *Held*, that the plaintiff was bound, in the absence of fraud or undue influence, by the certificate of the engineer, and could not dispute the same.

Idington, Q.C., for plaintiff.

R. Smith, contra.

BRIDGMAN V. LONDON LIFE ASSURANCE COMPANY.

Insurance—Untrue representation—"Brother"—Construction.

On an application for a life policy deceased stated, in answer to a question as to how many brothers he had, that he had three, whereas it appeared that he had seven, of whom four were half-brothers. *Held*, not such an untrue statement as to disentitle plaintiff to recover.

Rose for plaintiff.

Falconbridge contra.

GAUTHIER V. WATERLOO INS. COMPANY.

Insurance—Subsequent risk without assent—Mistake.

Contrary to the statutory condition contained in a policy issued to him by defendants, plaintiff, under the mistaken idea, as alleged, that his policy had expired, effected another insurance on the same property with a different Company, who issued to him the usual interim receipt, good for thirty days, and acknowledging payment of the premium, for which plaintiff gave his note instead of paying in money. After the fire, the agents with whom plaintiff had effected the subsequent insurance, discovering that the policy issued by defendants had not in fact expired, withdrew plaintiff's application for the subsequent insurance, and got back the interim receipt from him. *Held*, that the statutory condition was, nevertheless, broken, and that plaintiff could not, therefore, recover; and that

the question whether there had been in fact any subsequent insurance at all, by reason of the premium having been, contrary to the rules of the Company, paid by note instead of in money, could not be determined in this suit, particularly as the Company had admitted their liability by paying an insurance effected at the same time on plaintiff's furniture, the premium on which had been covered by the same note.

Crickmore for plaintiff.

Richards, Q.C., and *Clement, contra.*

BOOTH V. WALTON.

Setting off judgments.

Held, that an order staying proceedings on a judgment obtained by plaintiff against defendant until after the trial of an action by defendant against plaintiff, and the subsequent setting off of a judgment in the latter suit against that in the former had been improperly made, and the order was therefore set aside, with costs.

H. Cameron, Q.C., for plaintiff.

Watson, contra.

HEBNER V. WILLIAMSON.

Construction of deed.

When the words of a deed are doubtful, the intention of the parties will govern its construction, and not the wording alone. A. granted to B. a lot of land "with the exception of continuing Victoria Street of the Village of Centreville across the said lot." *Held*, Cameron J. dissenting, that this might be held to reserve sufficient land for that purpose, and not merely the right to continue the street, and that the evidence in this case shewed it was intended to reserve the land.

Per CAMERON, J.—The words of the deed only contain a reservation of a personal right to continue the road, and unless it is expressly found by the jury that it was intended to dedicate the land for a way, the intention must be gathered from the instrument.

C. Robinson, Q.C., for the plaintiff.

Read, Q.C., and *Ball, Q.C.*, contra.

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SAUVEY V. ISOLATED RISK INS. COMPANY.
*Insurance—Conditions on face of policy—
 Title as owner.*

Held, that the fact that certain conditions were inserted in the body of a policy of insurance did not make them less conditions than if they had been indorsed; but that not having been headed either as "statutory conditions" or as "variations," the Company could not avail themselves of them as a defence.

Held, also, that it was no misrepresentation on the assured's part to state that she was owner when she was only tenant for life of the building insured.

Edwards for plaintiff.

J. K. Kerr, Q.C., contra.

FITCH V. KELLY.

Pro-note—Presentment—Alteration—Ratification—Evidence—Set off.

Held, 1, that there was sufficient evidence to warrant the jury in finding that there had been a sufficient presentment of the note in question; 2, that even if the note had been altered after signature by the endorser, that it was altered to conform to the original intentions and agreement of parties, or if not, that there was sufficient evidence to warrant the conclusion that the endorser subsequently ratified the alteration; 3, that a set off, consisting of a claim for moneys received by plaintiff, which it was contended one of the defendants, the maker, was entitled to, could not be allowed, as it was not a claim or demand arising out of the note in question.

McMichael, Q.C., for plaintiff.

McDougall and Falconbridge contra.

ARMSTRONG V. CORPORATION OF THE TOWNSHIP OF WEST GARAFRAXA.

Municipal corporation—Loan for ordinary expenditure—Resolution of Council.

Defendants, through their treasurer, borrowed from plaintiff certain moneys, giving him their promissory notes for the amount. No by-law was passed for the purpose; but the money was borrowed on the authority of a resolution of the Council, which was

not under seal, and was expended in the repair of certain bridges belonging to defendants. The jury found that the money was borrowed, received and used for ordinary expenditure, which the repair of bridges was. *Held*, that the plaintiff was entitled to recover.

Belhune, Q.C., for plaintiff.

Robertson, Q.C., contra.

KINGSTON STREET RAILWAY COMPANY V. FOSTER ET AL.

Subscription for stock—Payment in goods.

Defendants subscribed for certain shares in the capital stock of the plaintiffs' company, promising and agreeing, each for himself and his assigns, with each other and with the plaintiffs, to pay the full amount of the shares as and where payable. *Held*, that this was an agreement to pay in money, and that a representation by the President of the Provisional Board that payment would be accepted in goods, was not binding on the company.

Cattanach, for plaintiff.

Foster contra.

REGINA V. COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Medical practitioner registered in England—Refusal of College of Physicians to register in Ontario—Mandamus.

A medical practitioner duly registered in England under the Imperial Act is entitled, without examination, to practise medicine in Ontario on payment of the proper fees, and that though his registration in England was after July, 1870, and a mandamus upon the College of Physicians and Surgeons of Ontario will therefore be granted to register him, on payment of such fees.

Kingstone, for plaintiff.

Crooks, Q.C., contra.

HARRISON V. PINKEY.

Trover.

Plaintiff leased certain premises from one D., agreeing, if D. sold during the term, to give up possession, with the right, if he had

any crop in the ground, of harvesting it, or if not, to be paid for the summer fallow. Before any crop was put in, D. sold to defendant, who refused to pay plaintiff for the crop subsequently put in by plaintiff and converted by defendant. *Held*, that plaintiff was entitled to recover in trover from defendant for the value of the wheat.

Fleming, for plaintiff.

Tilt, contra.

MADDEN V. COX.

Bill of exchange addressed to President for Company—Personal liability.

A bill of exchange addressed to defendant thus, "The President Midland Railway," was accepted in these words: "For the Midland Railway of Canada, accepted H. Read, Secretary, Geo. A. Cox, President." *Held*, Cameron J. dissenting, that defendant was personally liable.

O. Robinson, Q.C., for plaintiff.

J. K. Kerr, Q.C., contra.

COMMON PLEAS.

IN BANCO.—MICHAELMAS TERM.

December 26, 1879.

CONN V. MERCHANTS' BANK.

Bank bills—Payment—Subsequent failure of bank—Tender back within reasonable time—Notice of dishonour.

The plaintiff, a regular customer of the defendants' bank at Stratford, on the forenoon of the 28th May, made a deposit, which included \$1,000 of Mechanics' Bank bills, and was credited therewith in the bank books, the deposit being made in good faith and without any knowledge of the state of the Mechanics' Bank. At one p.m. of the same day, the defendants' agent received instructions by telegram from the head office in Montreal to be cautious about Mechanics' Bank bills. About an hour later he received a further telegram that the Mechanics' Bank had stopped payment, and to send in obligations promptly. Further communications passed between the

head office and the agent, and on the evening of the 30th the agent told plaintiff that his instructions were to charge plaintiff with the amount of these Mechanics' Bank bills, which was accordingly done, to which plaintiff objected. The plaintiff, on the 28th, had drawn out \$100, and on 29th, \$700, so that if he were deprived of the \$1,000 to his credit, his account would be overdrawn. On the 29th the notes had been sent down to the head office at Montreal. The notes were never tendered back to plaintiff. In an action to recover back the amount as money paid to defendants to plaintiff's use.

Held, that for the want of a tender of the notes on the 29th, the defendants made them their own, and plaintiff was therefore entitled to recover.

Held, also, that even if defendants had the right to send the notes to Montreal for presentment for payment, due notice of dishonour given on the 30th or 31st might have been sufficient, without tendering the notes back, but that no such notice was given.

Idington, Q.C., for the plaintiff.

R. Smith (of Stratford) for defendants.

ELLIOTT V. DOUGLAS.

Deed—False demonstration—Possessory title.

In ejectment, one of the deeds in plaintiff's possession was as follows: This Indenture made 11th day of October, 1821, at Quebec, in the Province of Lower Canada, by and between William Isaac Greig, Deputy Assistant Commissary General, of the one part, and William Howe, Esquire, accepting hereof for and on behalf of Alexander Thom, half-pay staff surgeon, of the other part, Witnesseth that the said William Isaac Greig for and in consideration of £50 of lawful money, &c., to him in hand paid by the said Alexander Thom, &c., doth grant, &c., unto the said Alexander Thom, his heirs and assigns for ever, all and singular, &c. To have and to hold the same with the appurtenances, &c., unto the said Alexander Thom, his heirs and assigns, to the sole and proper use, benefit, and behoof of the said Alexander Thom,

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his heirs and assigns for ever. All the covenants, including the one for further assurance, were made with Alexander Thom, his heirs and assigns. The deed was signed and sealed by W. J. Greig and William Howe.

Held, that in order to give effect to the deed in every particular according to the plain intent of the parties, the words "William Howe accepting hereof for and on behalf of," must be struck out from the premises as surplusage and repugnant, and thereby the whole conveyance was made operative as a grant to Alexander Thom.

Held, however, on the evidence the plaintiff had a title by possession.

McCarthy, Q.C., for plaintiff.

H. J. Scott for defendant.

RE KINGSTON ELECTION CASE. DRENNAN
v. GUNN. GUNN v. MACDONALD.

Application for new petitioner after lapse of six months—Corrupt bargain—Meaning of.

The applicant alleging that there was a corrupt agreement for the withdrawal of the petitions in the above, applied to have himself substituted as petitioner in each case, and that the deposits made in each case should remain as security for any costs that might be incurred by him, and for a day to be appointed for the trial of the said petitions.

Held, that the application could not be entertained, for that the six months limited by the Act of 1875 for the trial of election petitions had expired prior to the application made herein.

Held, also, that in any event the deposit should not be directed to remain as such security, for although the agreement made herein that the petitions should be allowed to lapse, each petitioner withdrawing the charges by him respectively preferred, must in law be deemed to be a corrupt bargain; yet under the statute the proposed withdrawal must, in the opinion of the Court, be induced by a corrupt bargain; so that the motives and intent of the parties, as a matter of fact, must be considered, and the

evidence, set out in the case, shewed that no corrupt bargain was intended.

Dr. Stewart, the applicant in person.
Bethune, Q.C., for Gunn and Macdonald.
Marsh, for Drennan.

YOUNG v. HOBSON.

Ejectment—Necessity of possession being taken under hab. fac. pos.—Statute of Limitations—Leave in term to supply evidence.

Where an action of ejectment was commenced against a person in possession of land before the statutory period had elapsed, and during the currency of the action, and under pressure thereof, on payment by the owner of a sum of money, possession was given by the owner with such person's consent, though after the lapse of the statutory period, and a written memorandum of the compromise was drawn up at the time,

Held, that this was sufficient to bar the statute, and that it was not necessary that the action should have terminated by the entry of judgment, and possession taken under a *hab. fac. pos.* issued thereunder.

On the argument in term of a rule nisi to enter a verdict for the defendant in this action, which was also ejectment, on the application of the plaintiff's counsel, the Court under the authority of R. S. O. ch. 49, sec. 8 a, 41 Vict. ch. 8, sec. 7 a, granted leave to the plaintiff to supply evidence of a search for the memorandum of the compromise, and also to put in the original writ of ejectment in the first named action, and the affidavit of service, a copy of such writ only having been filed at the trial.

J. K. Kerr, Q.C., for the plaintiff.
Osler, Q.C., for the defendant.

BINGHAM v. BETTINSON.

Chattel mortgage—Absence of redemise clause—Seizure and sale before default—Action for preventing mortgagor redeeming—Trespass—Trover.

On 29th January, 1878, plaintiff gave defendant a chattel mortgage in the usual form on certain goods to secure the payment of \$700 by half-yearly instalments, as

follows : \$100 on 29th July, 1878, and the residue by instalments of \$150 on 29th of January and July subsequently. There was no redemise clause ; but it was provided that on default of payment, &c., or in case of the mortgagor attempting to sell or part with the possession of the goods without the mortgagee's consent in writing, &c., the mortgagee might enter and take the goods, and sell the same, and also that on default of payment the mortgagee might distrain ; and further, that it should not be incumbent on the mortgagee to sell and dispose of the goods, but in case of said default should peaceably and quietly have, hold and occupy the said goods, without the let, &c., of the mortgagor. The mortgagor continued in possession. On 5th July, 1878, before any default was made, the mortgagee entered and seized and sold the goods, for which plaintiff, the mortgagor, brought an action, the 1st and 2nd counts being in trespass and trover respectively, and the 3rd count setting up the seizure and sale without plaintiff's consent before any default made, whereby plaintiff was deprived of his right to redeem and make the said payments as provided in the mortgage, and suffered loss, &c.

Held, that plaintiff was entitled to recover under the 3rd count.

Semble, per WILSON, C. J., disapproving of *Porter v. Flintoff*, 6 C. P. 340, and cases following it, that there was an implied right to possession until default, and therefore plaintiff was entitled to recover under the 1st and 2nd counts.

Bethune, Q. C., for plaintiff.

Drew, Q. C., for defendant.

WOODMAN V. BLAIR.

Breach of promise of marriage—Excessive damages—New trial.

In an action for breach of promise of marriage the jury found for the plaintiff with \$4,500, the case being fully and fairly brought before them, and there being evidence to support their finding, the Court refused to grant a new trial on the ground of the damages being excessive.

B. L. Doyle, for plaintiff.

Bethune, Q. C., for defendant.

LONGWITH V. DAWSON ET AL.

Conviction—Conviction made in county—Justice signing in city—Validity of—Evidence—Admissibility of.

The plaintiff was tried before the county justices in the township of Kingston for selling spirituous liquors without license, and convicted. The conviction on its face alleged that it was signed by both the justices in the township of Kingston. In an action of replevin for selling a horse of the plaintiff, under a distress warrant, issued under the conviction, alleging that the conviction was invalid, because, as was alleged, it was signed by one justice only in the township, the other signing in the city of Kingston, the defendant justified under the conviction.

Held, under R. S. O. ch. 5, sec. 3, and R. S. O. ch. 72, sec. 6, the justice had authority to sign in the city of Kingston ; and also that the conviction being valid on its face could not be questioned in this action, and evidence tendered to shew it was so signed in the city was inadmissible.

Mudie (of Kingston) for plaintiff.

Bethune, Q. C., and *Falconbridge*, for defendants.

SEVERN V. CLARK.

Chattel mortgage.

One F. owed the plaintiff, and one M. \$200 and \$100 respectively for goods supplied. The plaintiff had given a chattel mortgage on his property to one Flint on \$600, and being pressed for payment applied to plaintiff and M. for the same, offering them a chattel mortgage therefor, as well as for the amount he already owed them, which they agreed to, but, not having the money on hand at the time, borrowed it from one J., giving him their note therefor endorsed by F., and Flint was paid off, and his mortgage discharged. F., on 21st February, 1879, gave plaintiff and M. the mortgage now in question, which was in the usual form, the expressed consideration being \$900 money advanced to the mortgagor. The affidavit of *bona fides* was made by the plaintiff alone, described as "one of the mortgagees in the within mortgage named," and stated that

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the mortgagor was justly and truly indebted to him and M. as the mortgagees therein named in the sum of \$900 mentioned therein, &c., and on the renewal of the mortgage the affidavit was made by plaintiff in like manner. The plaintiff and M. were not in partnership, or in any way connected in business. The note given to J. was renewed several times, and there was still \$100 due upon it at the time of the trial. F. was a party to only one of the renewals, and paid \$150 on account of the note which was credited on the mortgage. The rest was paid by plaintiff and M. In June, 1878, the plaintiff and M., to protect themselves, bought in the goods at a bailiff's sale for rent and taxes. The goods were subsequently seized by the Sheriff under an execution at defendant's suit. On an interpleader, the plaintiff claimed as mortgagee and also as purchaser at the bailiff's sale, and defendant as execution creditor.

Held, that the plaintiff was entitled to recover; that the mortgage was valid; that it was given as a security for a present advance by the mortgagees, which the evidence shewed the transaction to be, and not merely that plaintiffs were accommodation endorsers of the note, so as to bring them within sec. 6 of the Chattel Mortgage Act.

Held, also, that the fact of part of the consideration, consisting of separate debts to plaintiff and M., did not prevent plaintiff making the affidavit of *bona fides*, in that the first section was not limited to cases of joint mortgages connected in business, &c.

Held, also, that plaintiff acquired a good title under the purchase at the bailiff's sale, and that such sales do not come within the Act so as to require the registration of a bill of sale on an actual and continued change of possession; but, *semble*, that the plaintiff, notwithstanding, could rely on his mortgage.

McMichael, Q.C., for plaintiff.

Ferguson, Q.C., for defendant.

CORBY V. CLARK.

This was a similar action, Corby, the plaintiff, being the assignee of M., referred

to in the above suit, in which a similar judgment was given.

John Crickmore, for plaintiff.

Ferguson, Q.C., for defendant.

McQUEEN V. McINTYRE.

Promissory note—Alteration of place of payment—Validity.

In action on a promissory note it appeared that the note, when made and signed by defendant, was made payable to plaintiff's order "at the Thomas Fawcett's Bank, Watford," which, without the defendant's knowledge or consent, was altered by making it payable, instead of as above, as follows: "at my," defendant's "place of business, Alvinston."

Held, that this was such a material alteration as avoided the note.

T. H. Spencer, for plaintiff.

McBeth, for defendant.

MOON V. CLARK.

Lien for improvements—Land obtained under immoral consideration.

In ejectment the defendant set up a lien for improvements made by him on the land, which it appeared had been obtained under an immoral consideration of his marrying the plaintiff's, testator's, daughter, who was already married.

Held, that the lien could not be supported.

Hector Cameron, Q.C., for plaintiff.

Bethune, Q.C., for defendant.

CORPORATION OF PETERBORO' V. HATTON.

Police magistrate—Fees for services—Clerk's fees—Sec. 412 of Municipal Act.

Where in the absence of the appointment of a police clerk by the municipal council of a city or town, the police magistrate of such city or town does the clerk's work himself he is not entitled to charge the fees therefor.

The salary paid to a police magistrate of such city or town covers all cases that may come before him, except what may be called purely county cases, namely, where the

C. P.]

NOTES OF CASES.

[Chan.

charge arises, and the parties reside out of the town or city, or for infringement of the Liquor License Act beyond the limits of the town or city, and cases of a similar character.

The 412th sec. of the Municipal Act applies both to cases arising under Dominion and Provincial Acts.

Bethune, Q.C., for the plaintiffs.

McMichael, Q.C., and *Hector Cameron*, Q.C., for the defendant.

REGINA V. PICHE.

Criminal law—Concealing birth of child—Evidence, sufficiency of.

On an indictment for concealing the birth of a child, the prisoner, who lived alone, had placed the dead body of the child behind a trunk in the room she occupied, between the trunk and the wall. The prisoner, on being charged with having had a child, denied it, but said she was suffering from cramps, and it was only after the doctor, who was called in, had informed her that he knew she had been delivered of a child, and on being pressed by one of the women present, that she pointed out where the body was, and the woman went and got it. Until pointed out the body could not be seen by anyone in the room.

Held, that the evidence, more fully set out in the case, was sufficient to be submitted to the jury, and the prisoner having been found guilty by the jury, the Court refused to interfere.

J. G. Scott, Q.C., for the Crown.

No one appeared for the prisoner.

CHANCERY.

Blake, V.C.]

[Dec. 31, 1879.

EARLS V. MCALPINE.

Will, construction of—Devise on condition—Restraint of alienation.

Testator devised his farm to his two sons in equal moieties, subject to certain legacies to daughters, and also a comfortable support for his wife, or the sum of ten pounds

to be paid by each of the sons annually during her life; and directed that the devisees should not sell or transfer the said property without the written consent of the widow during her life. One of the devisees, without obtaining the consent of the widow, mortgaged his portion of the estate.

Held, that the effect of giving the mortgage was to forfeit the estate the devisee took under the will.

Proudfoot, V.C.]

[Jan. 7, 1880.

MEREDITH V. WILLIAMS.

Separation deed—Renewed cohabitation—Second separation.

A provision in a deed of separation that on a renewal of cohabitation the maintenance secured to the wife for life should cease; but that in the event of the parties again separating the provisions of the deed should revive, does not render the deed void, on the ground that it is contrary to the policy of the law, as being a provision for future separation. In such a case, the Court *held*, that where the wife again separated from her husband for cause, the provision for her maintenance revived.

Proudfoot, V.C.]

[Jan. 7.

BURRITT V. BURRITT.

Executors—Discretion given by will.

The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real and personal property in Ontario, and also of personal property invested in the United States securities. By his will he named one resident of the United States (his brother-in-law), and two persons resident of Ontario, as his executors, to whom he bequeathed all his personal estate, upon trust as soon as conveniently might be, to sell, call in and convert into money such part of his estate as should not consist of money, and thereout to make certain payments and invest the balance of such moneys in or upon any of the public stocks or funds of the Dominion of Canada, of the Province of Ontario, or upon Canadian Government or real securities in the Province

of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid, or in or upon the shares, stocks or securities of any bank incorporated by Act of Parliament of Canada, paying a dividend, with power to vary the said stocks, funds, debentures, shares and securities: "And as respects my American securities, having the fullest confidence in the judgment and integrity of the said W.E.C., my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and re-investment thereof, or the permitting of the same to be and remain as they are until maturity thereof, and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby."

Held, that this did not authorize the re-investment of moneys, realized on the sale, or maturing of any of these securities in the United States, but that the executors were bound to bring them into this country, and invest them in one or other of the securities enumerated by the testator.

Proudfoot, V. C.]

[Jan. 7.]

ROGERS v. ULMANN.

Principal and agent—Master and servant.

In consideration that the plaintiff would act as agent for the defendant in the purchase and consignment of furs to the defendant, and assume one-half of the losses to the extent of \$3,000, the defendant agreed to pay plaintiff one-half the net profits of each year's transactions. The plaintiff impugned the *bona fides* of a settlement which he had been induced to make with the defendant, acting through an agent, and the Court, being satisfied that such settlement had been secured by the fraudulent misrepresentations of such agent, *held* the plaintiff entitled to an account of the transactions and an inspection of the books of the defendant, notwithstanding the provisions of the statute 36th Vict. ch. 25, s. 1; R. S. O. ch. 133, sec. 3.

NOVA SCOTIA REPORTS.

COUNTY COURTS.

AMES ET AL V. GINTY.

Statute of Frauds, sec. 5—Necessity of written order to bind purchaser—Constructive acceptance—Commercial travellers.

[Savary, Co. J., Annapolis, 1879.]

SAVARY, County Judge.—This is an action to recover the sum of \$236.86, being the price of a lot of goods; and the defence is based upon the well-known 5th section of chapter 83, Revised Statutes, commonly called the "Statute of Frauds," or more fully, as in the title to the chapter "for the Prevention of Frauds and Perjuries" which, following the English statute of the same character, enacts that "No contract for the sale of any goods for the price of forty dollars or upwards shall be good, unless the buyer accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part payment or that some note or memorandum in writing of the bargain to be made and signed by the parties to be charged by such contract, or by their agents thereunto authorized." There was clearly no memorandum in writing of the bargain, signed by the defendant at the time. A verbal order was given, which Mr. Foster, the plaintiff's agent, took down from the defendant's dictation on a loose piece of paper, throwing away the latter after carefully copying it into a regular order-book. The leaf of this book, containing the order, was detached from the margin, and sent to the plaintiffs at Montreal, the order having been given at the place of business of the defendant. I think this leaf comprising the whole contract was, when tendered, rightly received in evidence and, with the oral testimony, it fully establishes a strictly oral contract between the parties. But it is best to state the facts I do find on the evidence. I find that the defendant ordered the goods by word of mouth from plaintiffs through their agent, Foster, whose testimony I implicitly believe; that the defendant lived at Caledonia, about midway between Annapolis and Liverpool; that it would be equally convenient for the defendant to have them come to Liverpool by steamer from Halifax, or to Annapolis by the W. and A. R. R.; that the latter was the more natural and reasonable way to send them; that they were ordered to be sent in that way by the Intercolonial Railway, *via* Riviere du Loup, to Windsor Junction, "care of" W and A. R. R. to Annapolis, and were actually so sent and arrived there promptly; that they

were addressed to J. Mc.G., Caledonia, and properly so, because, as I find, a parcel previously addressed the same way was received by the defendant, and that he held out this address as the proper one, not instructing plaintiffs to address these goods differently; that no invoice or advice from the plaintiffs reached the defendant, none having been proved to have been sent to him, except by the very unreliable evidence of the plaintiffs' general custom; that the defendant, however, knew of their arrival by information received from the W. A. R. R. Co., through the coach driver between Annapolis and Liverpool, whom he made his agent for the purpose of enquiry, but did not notify the plaintiffs of his refusal to accept until the price of the goods became due and a bill had been drawn on him for their price five months after arrival.

It was contended that the letter of the defendant constituted a sufficient "note or memorandum" of the bargain to satisfy the statute, and in many cases such letters have been so held, especially in the notable cases of *Bailey v. Sweeting*, 9 C.B. N.S. 1843, and *Wilkinson v. Evans*, L. R. 1 C. P. 407, and the very recent case of the *Leather Cloth Co. v. Hiernomus*, L. R. 10 Q. B. 140, the latest case, I think, in which the clause of the English Act corresponding to this has occupied the attention of the English Common Law Courts, a case, by the way, very very similar to this one in some of its leading features. But all the cases referred to differ from this in the circumstance that the letters of the defendants referred to the invoice furnished to the buyer in such a way that it could be read with them, or in some other manner indicated the entire contract, leaving nothing to be supplied *dehors* the writing. Here the letters contain nothing to show the particular articles purchased or their prices, either intrinsically or by reference to other documents, and point to a contract to send goods by a different mode of conveyance from that employed by the plaintiffs.

The only other point raised is whether there was an actual acceptance and receipt. Had the plaintiffs proved the sending of an invoice to the defendant, or a letter of advice that the goods were despatched as ordered, which would have placed him under an obligation to reply, accepting or repudiating them, I would have thought that the case came fully within those of *Bushel v. Wheeler*, 15 Q. B., p. 442, and *Morton v. Tibbett*, 15 Q. B., p. 428, the principle underlying which is illustrated by the cases of *Lucy v. Mowfet*, 5 H. & N. 229; *Richardson v. Dunn*, 2 Q. B. 218, and *Gaskill v. Skene*, 14 Q. B. 664. The authority of *Morton v. Tibbett*, and *Bushel v. Wheeler*,

has been somewhat questioned in the Court of Exchequer; but the former has been very distinctly ratified and approved of in some important cases in the Queen's Bench, especially *Currie v. Anderson*, 2 E. & E. 592, per Crompton, J., page 598; and both cases in *Meredith v. Meigh*, 2 E. & B. 364, per Campbell, C. J., on page 370. If the facts brought the case within that of *Bushel* and *Wheeler*, I should have felt bound to put to myself the question whether the defendant had not practically accepted the goods within the meaning of the statute, and whether under the circumstances the Windsor and Annapolis Railroad Company were not the defendant's agent to accept and receive the goods for him, on which point an affirmative decision would have no little colour from the course of dealing between the parties, the W. & A. R. Co. not being carriers to the defendant's place of residence but to Annapolis only, and the goods not being ordered to be merely *carried* by them, but to be consigned to their *care*. The case of *Norman v. Phillips*, 11 M. & W. 211, relied on strongly by the learned counsel for the defendant, only goes to show that the question of an acceptance by a tacit acquiescence is one of degree; that although where the silence is long and unreasonable, a jury might be justified in inferring an acceptance, yet where it is otherwise there may be a scintilla of evidence, but not enough to sustain a finding. But in the absence of an invoice, or some other communication from the plaintiffs, informing him of the fulfilment of the contract on their part, I fail to see any obligation on the defendant to be otherwise than silent, and I can draw from his silence no inference of his acquiescence. Therefore, in the absence of a sufficient note or memorandum of the bargain signed by the defendant, and of sufficient evidence to justify the conclusion that the defendant in any sense accepted the goods, I think the plaintiffs must become non-suit.

I must confess to a disposition to uphold this contract if possible; but I believe I have consulted every case bearing on the subject in the English reports since 1850, and all the Nova Scotia and New Brunswick cases, and cannot bring myself to extend the doctrine of inferential or constructive acceptance beyond the case of *Bushel v. Wheeler*, which has, as I have indicated, an important and, I think, essential ingredient which this lacks. I do not think the Appellate Court would hold me justified in doing so. Judges are naturally anxious not to construe a statute designed for the prevention of fraud in such a way as to promote fraud; but I cannot give any statute an unnatural construction, and the policy of this one clearly

LAW STUDENTS' DEPARTMENT.

requires that an executory contract for the sale of goods over forty dollars should be evidenced by a writing. I must administer the law as I find it, leaving the responsibility with the legislators, and I have always thought, and still think, that the fifth section of our Statute of Frauds ought to be repealed, for I am of opinion that in the present state of society and commercial habits it causes more frauds than it prevents.

LAW STUDENTS' DEPARTMENT.

In our last number we published a letter from "A Student," complaining of a want of courtesy on the part of a Q.C. We have since heard from the gentleman referred to, and it is quite plain that our supposition was correct, namely, that he did not suppose that the student "was asking a *bond fide* question." It was looked upon by him as a joke, and so treated. The name of the Q.C., without more, would be a sufficient guarantee, not only that no discourtesy could have been intended, but that he was thoroughly competent to enlighten our correspondent, had times and circumstances been favourable for a dissertation on the points propounded.

EXAMINATION PAPERS. MICH. TERM, 1879.**FIRST INTERMEDIATE.***Smith's Manual of Equity.*

1. Will the Court of Chancery restrain the publication of letters by the receiver of them where the sender has not assented to the publication? What is the principle upon which the Court acts in granting or refusing such injunction?
2. At whose instance may a bill to establish a will be filed?
3. Under what circumstances will the Court decree the cancellation and delivery up of void instruments?
4. Under what circumstances will the Court of Chancery make an allowance for maintenance of an infant out of his estate, notwithstanding that the father is able out of his own property to maintain him?
5. State clearly what you understand by the separate estate of a married woman.

6. A testator devises property worth \$1,000 to A which belongs to B, and bequeaths to B the sum of \$1,000. In case B refuses to comply with the will, can he claim the legacy?

7. What difference is there between the lien for costs which a solicitor has upon papers and money in his hands?

SECOND INTERMEDIATE.*Leith's Blackstone—Greenwood on Conveyancing.*

1. After an agreement for a lease, is the lessor bound to show title on the request of the lessee? What is the consequence if he refuse to do so?
2. Whose duty is it to prepare the drafts and the engrossments of the instruments for the carrying out of agreements for sales and leases?
3. What would be the proper form of the reddendum clause in a lease made by a mortgagor and mortgagee of real estate, the mortgage not being overdue?
4. What were the five different modes of ouster? Distinguish between them?
5. Apply the maxim *de minimis non curat lex* to lands acquired by *alluvion* or by *dereliction*.
6. What is ameliorating waste? To what extent is it not permissible?
7. Must a surrender be in writing? Answer fully, distinguishing between various circumstances and cases.

FIRST YEAR SCHOLARSHIP.*Williams on Personal Property.*

1. Give the principal provisions of the Act (known as Lord Tenterden's Act) which require certain contracts to be in writing.
2. What is meant when it is said that certain contracts of insurance are contracts of indemnity? Explain fully, and give an example in which such a contract is one of indemnity, and one in which it is not.
3. In what different ways do the Courts of Equity and Law view the case of a bequest of personal chattels to A for life, with a bequest over to B upon A's death? What is the ground of the view taken at Law? In what form would you draw such bequests?
4. What is the difference between a legally constituted executor and an executor *de son tort* (1), as to their liability (2) as to their privileges?
5. What is the meaning of the maxim *actio personalis moritur cum persona*? What exceptions are there now to its generality?

CORRESPONDENCE.

CORRESPONDENCE.

Appointment of Deputy Judge at Hamilton.

To the Editor of THE LAW JOURNAL
Hamilton, Jan. 14, 1880.

SIR,—The members of the Law Association which has recently been established by the profession practising in this city and county have, at meetings lately called for the purpose, been warmly discussing the late appointment by the County Judge of a gentleman, a member of a firm in large practice, as Deputy Judge for the County Court of the County of Wentworth.

While the *personal* of the appointment is in every way satisfactory, the Association, by a very large and influential vote, have recorded their disapprobation of an appointment which is calculated to bring the administration of justice in this county into disrepute, inasmuch as we have to-day the very anomalous proceeding of a gentleman advocating the interests of his firm's clients on one occasion, and performing the functions of a judge in the same court on another occasion, and even in one instance of granting an order in a case in which his own firm was engaged.

It must be evident to every professional man that while a gentleman holding such a position may discharge his two-fold duties in a strictly impartial and upright manner, and I believe him incapable of acting otherwise, the impression left upon the mind of the layman cannot be otherwise than unsatisfactory, and attended with suspicion and doubt, and must tend to weaken that respect for the Bench which is so essential for the proper administration of justice.

The action taken by the members of the profession here is as much in the interest of the profession at large as for themselves, and the resolutions passed condemn in the most unmistakable language the system of appointing a practising barrister (who is a member of a firm in large practice, as is the case here) to the position of a deputy judge, and also conveys the expression of opinion on the part of the profession here, that if other judicial assistance is necessary, then a Junior Judge should be appointed.

BARRISTER.

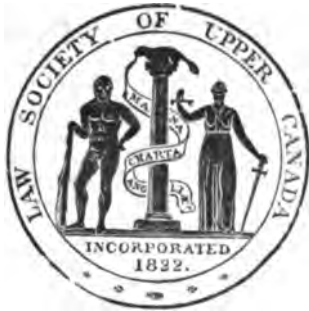
FLOTSAM AND JETSAM.

THE LAW OF CONTRACTS.—Pomponius, a celebrated law teacher of Rome in the sixth century, entered into a contract with a Roman citizen to instruct his son in the law. This was the contract: So many coins if the pupil became learned in the law, the test to be that he should win his first case before the tribunal. Pomponius turned over his pupil as perfected in his studies. The father brought suit against the master to set aside the contract, and retained his son to plead this his first case. "If my son gains his case, the contract is made void. If he loses, I am not bound." Pomponius answers: "If I fail in my defence the son wins his case, and I am entitled to my money. If I gain, the court gives me the money by its decree." Which side had the law?

TO CORRESPONDENTS.—We have received several letters on important subjects which must, however, lie over until next issue. Amongst them is one from Halifax on the vexed question of the reconveyance of Insolvents' Estates. Another calls attention to a pamphlet recently issued by Mr. Sheriff McKellar; a remarkable document truly, which, as a specimen of vulgarity impudence, concealed official greed and ingenious misrepresentation, has seldom been surpassed. It takes an Official Assignee, a Registrar or a Sheriff to formulate his grievances (i. e. his desire for increased fees) and then to try to lobby a Bill through the Legislature to meet the views of his own class. There is a limit, however, to this kind of thing, as Sheriffs will probably find to their cost. Official Assignees have themselves to thank in a great measure for the storm of obloquy which has assailed the Insolvent Act. Registrars stated "grievances" until the Legislature was worried into paying attention to them. The result was that the country now gets the benefit of all the surplus which previously went to swell incomes out of all proportion to the work or responsibility involved. The same thing will probably happen to the Sheriffs. The threat of a statutory requirement that they should state the profits of their office under oath, and allow their books to be examined, would probably put an end to this agitation of Mr. McKellar and his official allies.

To "Barrister-at-Law" we would say, that, as the case he refers to has not been reported, his communication had better stand over. We think there were possibly some errors in the copy of the judgement seen by him. The subject referred to by "Rural" is touched upon at p. ante. The letter of "*Scriptor non Scriptum*" will appear in the February number.

LAW SOCIETY, MICHAELMAS TERM.



Law Society of Upper Canada.

OSGOODE HALL,

MICHAELMAS TERM, 43RD VICTORIAE.

During this Term, the following gentlemen were called to the Bar, the names are placed in the order in which they entered the Society, and not in the order of merit :—

JAMES CULLEN LILLIE.
 WILLIAM JOHN FRANKS.
 JAMES WILLIAM HOLMES.
 JOHN SANDFIELD MACDONALD.
 GERARD HOLMES HOPKINS.
 WILLIAM JOSEPH DELANEY.
 WILLIAM MCKAY READE.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks :—

Graduates.

PETER SINCLAIR CAMPBELL.
 ALEXANDER EDWARD WARD PETERSON.
 JAMES ANDREW THOMAS.
 EDWARD ROBERT CAMERON.
 GEORGE BENJAMIN DOUGLAS.
 JOHN JOSEPH O'MEARA.
 JOHN WILSON ELLIOTT.
 WILLIAM H. BARRY.

Matriculants.

JAMES GRACE.
 WILLIAM AITCHISON PROUDFOOT.
 WILLIAM T. ALLAN.
 HENRY THOMPSON BROCK.
 ALBERT CARSWELL.

ALBERT EPHRAIM GRIER.
 ADOLPH AUGUST KRAFT.
 WILLIAM EDWARD MIDDLETON.
 CHARLES POTTER.
 JOHN CLINIE DREWRY.
 FRANK HEDLEY PRIFFEN.
 GRANVILLE C. CUNNINGHAM.
 CHARLES A. GRIER.
 JOHN WILFAD.
 JOHN A. RICHARDSON.
 FLAVIUS L. BROOKE.
 MARCUS W. RUSS.
 WILLIAM D. INNES.

Junior Class.

JOHN THOMAS SPROULE.
 DYCE W. SAUNDERS.
 HENRY JOHN WICKHAM.
 GEORGE HALES.
 ARTHUR BURWASH.
 JOHN ALEXANDER MCINTOSH.
 GEORGE CORRY THOMSON.
 NORMAN MCMURCHY.
 CHECKLEY FRANCIS JOHNSTON.
 WILLIAM JAMES CHURCH.
 HUME BLAKE ELLIOTT.
 SHERIFF HARKIN.
 JAMES MILLER.
 CHARLES FRANKLIN FAREWELL.
 ALEXANDER GEORGE MURRAY.
 WILLIAM HIGHFIELD ROBINSON.
 JOHN MCNAMARA.
 FREDERICK THISTLEWATE.
 CHARLES MORSE.
 EDWARD AUGUSTUS WISMER.
 JOSEPH ALPHONSE VALIN.
 GEORGE WEIR.
 WALTER SAMUEL MORPHY.
 LOUIS HAYES.
 JAMES S. BODDY.

Articled Clerk.

JOHN ARTHUR ALLRIGHT.

DIARY—CONTENTS—EDITORIAL NOTES.

DIARY FOR FEBRUARY.

1. Sun. ..Sexagesima Sunday.
2. Mon. ..Hilary Term begins.
3. Frid. ..Hagarty, C. J., C. P., sworn in, 1856.
4. Sun. ..Quinquagesima Sunday.
10. Tues. ..Queen Victoria married, 1840.
11. Wed. ..R. E. Caron, Lieut.-Governor of Quebec, 1873.
14. Sat. ..Hilary Term ends.
15. Sun. ..Quadragesima Sunday.
16. Mon.Last day to move against Municipal Elections.
17. Tues. ...Supreme Ct. sittings. Wm. Osgoode, first C. J. of U. C., died 1834.
18. Wed. ..Canada settled by the French, 1534.
19. Thur. ..Re-hearing Term in Chancery begins.
22. Sun. ..Second Sunday in Lent.
27. Frid. ..Sir John Colborne, administrator, 1838.
29. Sun.Third Sunday in Lent.

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Canada Law Journal.

Toronto, February, 1880.

A Bill has been brought in before the Legislative Council of Victoria, embodying the first part of a proposed code of the law. This action, on the part of that distant colony, foreshadows what must be done before long in the mother country and her other colonies.

In *Mark v. Eads*, 2 Sol. J. 127, an attempt was made to set aside the exercise of a power of sale in a mortgage on the ground that the sale was by a person who had paid off the mortgage, but had not actually obtained an assignment of it. But Fry, J., held that the power was not suspended, and that the mortgagee, being a trustee for the person who had paid him, was bound to exercise the power at his instance.

We have published several well written letters as to when a reconveyance may be made of an insolvent estate under section 60 of the Act; the last two coming from Halifax. It is hardly worth while, however, pursuing the subject any further, as the opinion is prevalent that the whole fabric of insolvency procedure will be swept away next session. In any case, those interested must admit that there remains but little to be said on the subject.

In the now famous case of *Phillips v. London & South-Western Railway Co.*, L. R. 4 Q. B. D. 506, the largest damages ever awarded by a jury against a railway company for personal injuries have been given at the second trial under the direction of Lord Coleridge. The sum given to the plaintiff, who is a

EDITORIAL NOTES.

London physician in extensive practice, was £16,000 sterling. The Common Pleas Division refused a new trial on the ground of excessive damages, and it is said that the Company will appeal to the House of Lords.

In the Index Number of the Supreme Court's Reports (Vol. ii.), just issued, there is a list of Errata, numbering twelve. These could be increased and yet not exhaust all the errors. For instance the author of the well-known law treatises is not "*Archibold*" (pp. 357, 363). Coke on *Littellon* (p. 436) has an odd appearance, as has *Phillipp's* Law of Insurance (p. 416). *Brown* on the Statute of Frauds, adds another letter to his name (pp. 682, 634). *Blackburn's* Commentaries (p. 446) is rather a glaring blunder. So the spelling of Lord *Hardwick* (p. 509), and 2 *Sand. R.* (p. 492) might be amended.

A confectioner had for more than twenty years used large mortars in his back kitchen, which abutted on the garden of a physician. Subsequently the physician erected in his garden a consulting room, one of the side walls of which was the party wall between the confectioner's kitchen and the garden. The noise and vibration caused by the use of the mortars, which had previously caused no material annoyance to the physician, then became a nuisance to him, and he brought an action for an injunction. *Held*, that the defendant had not acquired an easement either at Common Law or under the Prescription Act, and that the plaintiff was entitled to an injunction: *Sturgess v. Bridgman*, 41 Law Times, 219.

We learn from the columns of the *Solicitor's Journal* that the Temple

Benchers, following the example of those of Lincoln's Inn, are about to provide a set of rooms for barristers and students. Members of the Inn will subscribe 10s. a year therefor. The rooms are to consist of a reading-room, a writing-room and a smoking-room, with a kitchen for preparing tea, coffee and other provisions, on a tariff to be settled by a committee elected by the subscribers. The Benchers at Osgoode Hall might follow these precedents a little more closely, and develop the very serviceable luncheon-room so as to provide for a few more of the creature comforts to sweeten professional life.

It does not seem to be generally known, but it is nevertheless a fact, that there is a Committee of the Law Society known as the Discipline Committee, appointed under section 1 of cap. 31, 39th Vict., which gives power to the Benchers to make by-laws, amongst other things, respecting "matters relating to the interior discipline and honour of the members of the bar." We frequently receive communications on subjects of this nature, and should be glad if, in future, correspondents would authorise us to forward their letters with their names to the Secretary of the Society to be laid before this Committee. Some would probably not like to do this; but every member of the profession owes a duty to his brethren in this matter, which should not lightly be disregarded. The Committee, we understand, do not consider it *their* duty to take up such cases, unless formally brought before them. There is room for question as to how far they are right in this, but it should certainly be some one's duty; possibly it should devolve upon the Solicitor of the Society to make the preliminary enquiries, and lay the case before the Committee.

UNLICENSED CONVEYANCERS—SHERIFFS' FEES.

UNLICENSED CONVEYANCERS.

The last but not the least amusing advertisement of that omnivorous class known as *conveyancers* that we have seen is one that commences with these words, given in large capitals,—“Life is uncertain—Death is sure.” The reason of this solemn but somewhat antique warning will be apparent as we proceed. The reader is then told that “Every person should make a will and not leave *their* hard-earned money to be eaten up in law.” Then follows the name of the advertiser. We really must give him the benefit of a free advertisement. The sublime impudence of the man must not go unrewarded. He is styled W. F. Kay, J.P. He lives in a village we never heard of, but doubtless he is there a person of some importance; perhaps a prophet, perhaps the town crier, or perhaps the pound-keeper, or a broken-down grocer. But he is not merely a J.P., or otherwise, for he “makes a speciality of writing wills (we are thankful for this at all events), deeds, mortgages, chattle (*sic*) mortgages, leases, agreements of all kinds. Charges moderate.” We should suppose so, doubtless very cheap, and—very nasty.

This is all very funny; but we wonder if it ever strikes the Benchers of the Law Society or the Attorney-General that ignorant charlatans, such as we may safely assume men like this to be, are not only destroying the legitimate business of the profession, who pay large fees for the right to practise, but are actually dangerous to the community. How long will the profession put up with this state of things. We fail to see the justice of calling upon country solicitors to pay fees when their interests are left utterly unprotected. We direct attention to the several letters on this subject published in another place.

In the name of the profession in country places we call upon the Benchers to take some action in this matter. There is no excuse for further delay. The complainants have justice on their side, and if they act unitedly and energetically they must eventually succeed. They are too influential and numerous a body to have their claims for protection pass unheeded. As far as lies in *our* power we shall further all reasonable demands for their relief. It might be that the best thing in the way of a beginning would be to compel these amateur conveyancers to pass an examination before a committee of the Law Society or before the County Judges, with power to take away their licenses for gross errors or misconduct; they should also pay an annual fee to the Law Society, and be made responsible to the same extent as solicitors. We simply throw out these suggestions. It is for the Benchers to make a full representation of the case to the Attorney-General who should at once take action in the matter. What may be done in the premises will be watched with interest.

SHERIFFS' FEES.

When answering a correspondent in our last issue, we referred to a pamphlet published by Mr. Sheriff McKellar, having for its object the promotion of a Bill to give to Sheriffs certain fees, which, as is therein alleged, are occasionally and illegally taken by attorneys. The pamphlet consists of an introduction, a petition, the comments of the author, embodying a number of bills of costs, affidavits, &c., and a draft of the proposed Act. A correspondent deals with the matter somewhat in detail. We leave that to him.

We are informed that some of the evidence collected by the pamphleteer in support of his case, was obtained partly in the following fashion; and we here

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speak of one of the cases entitled *Suter v. Servos*; and it is said that the same procedure was adopted in other cases. A person calling himself Suter went to an attorney and instructed him to issue a writ against a person he called Servos, stating that the latter would, at a certain time, be at a place, then designated, and could there be served. The writ was issued accordingly, and the person pointed out as defendant was served by the attorney's clerk, as requested by the plaintiff, so as to save delay. The plaintiff, it appears, subsequently called on the attorney with the defendant, and stated that he had settled the debt with the defendant or something to that effect. The bill being demanded, the amount was paid. This bill with others was then submitted by Mr. McKellar, or by the plaintiffs, to taxation, *not* to the proper officer, but to the Clerk of the County of Waterloo, Mr. John McDougall, who, without any notice to the attorneys, and in suits in which he had no jurisdiction, assumed to tax the bills, and gave allocaturs. Mr. McDougall appears to have taxed off some items which would have been allowable in the counties where the writs issued.

We suppose the expense of getting up all this evidence cost a little money; at least we happen to know one Sheriff who declined to contribute to a fund which Mr. McKellar thought necessary to raise to further the object of this pamphlet.

Our readers can form their own opinion of one holding the high office of Sheriff, who could descend to such means to build a rickety foundation whereon to erect a monstrous piece of legislation, unnecessary for the purposes assigned in it, unjust to the profession, and highly injurious to the public interests.

Passing over the alleged untruthfulness of the pamphlet, and the reckless-

ness of the affidavits used in it, we feel it a duty to enter a protest against the language used by one officer of the Courts when speaking of other officers, at least quite as much entitled to respect as himself. This language, from one in his position, is utterly objectionable from every point of view, and might fairly be characterized by a much harsher expression.

And again, it might have been hoped that when this pamphleteer accepted the high position of Sheriff, he would have left politics alone; but the reader cannot avoid noticing that most of the attorneys whom he has selected for vituperation, are men who, when he was in the arena of politics, were political opponents, whilst, in a fulsome manner, he apologises to a former ally for referring to his name, the latter being a member of the House, and one who was recently stricken off the rolls for disgraceful conduct. The manner in which the pamphlet has been distributed, is in keeping with this phase of its author's conduct. The pamphlet is apparently intended to give information on the subject in question to the members of the Local Legislature. But we are informed that it was sent only to those who had been, in former days, his political allies, and that it was not sent to any lawyer or prominent member on the other side of the House.

We had thought of suggesting that a person who could act in the way alluded to, is not a proper person to be, in the words of Blackstone, "the first man in his county." But there is a very serious question whether or not Mr. McKellar is in fact a Sheriff at all. He was appointed by the Local and not by the Dominion Government. Very high legal authorities hold the opinion that the appointment of Sheriffs under the British North America Act lies with the Governor-General, and not with the Lieutenant-Governor.

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So, after all, it may not be necessary to remove him, but rather to pass an Act, which in such case would be desirable, to protect him from actions of trespass innumerable, including possibly a case where capital punishment was involved, which then might or might not come under the category of "Killing no murder."

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In directing attention to the Judicature Bill introduced into the Ontario Legislature, on the 14th of January, by the Attorney-General, it may perhaps be of advantage to glance briefly at the history of the English Judicature Act, in order that a true estimate may be obtained, as well of the reforms proposed as of the consideration bestowed in carrying out those reforms.

In the year 1850, a Commission was appointed in England to inquire into the constitution of the Courts of Common Law; and this Commission reported that "the Courts of Common Law, to be able satisfactorily to administer justice, ought to possess, in all matters within their jurisdiction, the power to give all the redress necessary to protect and vindicate Common Law rights and to prevent wrongs whether existing or likely to happen unless prevented;" and further, that "a consolidation of all the elements of a complete remedy in the same Court was obviously desirable, not to say imperatively necessary, to the establishment of a consistent and rational system of procedure." In 1851, another Commission was appointed to inquire into the constitution of the Court of Chancery, and this Commission reported that "a practical and effectual remedy for many of the evils" which existed might "be found in such a transfer or blending of jurisdiction, coupled with

such other practical amendments as will render each Court competent to administer complete justice in the cases which fall under its cognizance."

In consequence of these reports, some changes were made by which the procedure of the Courts of Chancery and Common Law was improved; but the changes made proved wholly inadequate.

In 1867, another Commission was appointed to inquire into the operation and effect of the constitution of the Court of Chancery, the Superior Courts of Common Law, &c., and into "the operation and effect of the present separation and division of jurisdiction between the said several Courts . . . and generally into the operation and effect of the existing laws, and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in Chambers, with a view to ascertain whether any, and what changes and improvements . . . may be advantageously made so as to provide for the more speedy, economical and satisfactory dispatch of the judicial business."

The Commissioners (of whom Lord Selborne says they were the best that could possibly have been appointed) issued their first report in March, 1869. In this report they directed attention to the division of the Courts and the distinction between Common Law and Equity, which had "led to the establishment of two distinct systems of Judicature, organized in different ways, and administering justice on different, and sometimes opposite principles, using different methods of procedure, and applying different remedies." After pointing out the evils of the old system; and the inadequacy of the remedies so far applied, they proceeded, "We are of opinion that the defects adverted to cannot be completely remedied by any mere

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transfer or blending of jurisdiction between the Courts as at present constituted, and that the first step towards meeting and surmounting the evils complained of will be the consolidation of all the Superior Courts of Law and Equity, &c., into one Court . . . in which shall be vested all the jurisdiction which is now exercisable by each and all the Courts so consolidated. This consolidation would at once put an end to all conflicts of jurisdiction. No suitor could be defeated because he commenced his suit in the wrong Court; and sending the suitor from equity to law or from law to equity, to begin his suit over again in order to obtain redress, will be no longer possible. All suits should be instituted in the Supreme Court, and not in any particular Chamber or Division of it; and each Chamber or Division should possess all the jurisdiction of the Supreme Court with respect to the subject-matter of the suit, and with respect to every defence which may be made thereto, whether on legal or equitable grounds, and should be enabled to grant such relief or to apply such remedy or combination of remedies as may be appropriate or necessary in order to do complete justice between the parties in the case before the Court, or in other words, such remedies as all the present Courts combined have now jurisdiction to administer."

In order to facilitate the transition from the old system to the new, the Commissioners recommended that the existing Courts should retain their distinctive titles and constitute so many Chambers or Divisions of the Supreme Court.

In 1870, Lord Hatherley introduced a Bill to carry out the recommendations of the Commissioners; but this Bill, after much discussion, was withdrawn. In

1873, Lord Selbourne introduced another Bill, which, after careful consideration by a select committee of the House of Lords, became law, and which, together with a bill introduced by Lord Cairns and passed in 1875, constitute substantially the Supreme Court of Judicature Act now in force in England.

In introducing the Act of 1873, Lord Selbourne said, "Four points have become settled in the minds of those who best understand the subject as well as in the mind of the public. The first is the artificial separation of legal and equitable jurisdiction, such as in principle never did exist and does not exist in any country in the world except those which have borrowed our system. . . . There has been a conviction that, whatever else ought to have been done, we must put the finishing stroke to measures of a more particular character adopted in the same direction by bringing law and equity into one single administration in the Courts of Law of this realm. The second point is, that we must bring together divided Courts and divided jurisdiction by erecting or rather re-erecting a Supreme Court, which, operating at various points and with a number of judges, should still exercise an undivided jurisdiction combining all the jurisdiction of all the Superior Courts. The third point is, that it is desirable to provide, as far as possible, for cheapness, simplicity and uniformity of procedure. The fourth point is that is necessary to improve the constitution of the Courts of Law."

It is the law which has been framed in England on these principles which it is now proposed to introduce into this Province, by the Ontario Judicature Act, with such alterations as seemed advisable.

The Bill is divided into seven parts:—

(1) Constitution and Judges of the Su-

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preme Court ; (2) Jurisdiction and Law ; (3) Sittings and Distribution of Business ; (4) Trial and Procedure ; (5) Offices and Officers ; (6) Jurisdiction of County Courts ; (7) Miscellaneous Provisions. The one great aim is, of course, the fusion of law and equity. For this purpose the reconstitution of the Courts, and the introduction of a new practice have been thought necessary, in order to bring about a uniform system, under which law and equity will be concurrently administered. The Court of Appeal and the Superior Courts of Law and Equity are consolidated into one Supreme Court, which will not, however, in point of fact, as such, exercise any jurisdiction. The Supreme Court is divided into two permanent divisions, one to be called "The High Court of Justice for Ontario," and the other "The Court of Appeal for Ontario." All the jurisdiction of the Superior Courts, and of Assize, Oyer and Terminer and Gaol Delivery, is transferred to the High Court. The Court of Appeal will have all the powers of the existing Court of Appeal. Effect will be given to the equitable rights and remedies of plaintiffs, and also to the equitable defences of defendants. The Courts will give effect to counter-claims of defendants ; will take incidental notice of the equities of other parties ; will stay proceedings by its own order ; will give effect to legal rights and remedies, and will, by rule, prevent multiplicity of proceedings. To prevent any conflict with the rules of the Common Law, and of Equity, the law is expressly declared on certain points, and it is enacted generally that, in all cases not enumerated, the rules of Equity are to prevail.

The High Court is to consist of three divisions, namely, the Queen's Bench Division ; the Chancery Division, and the Common Pleas Division. Certain

matters of an administrative character are specially assigned to the Chancery Division, but other causes may be assigned to any Division. In case a cause is assigned to a wrong Division, or if for any other reason it seems advisable, a cause may be transferred from one Division to another. All business is, as far as practicable, to be heard by a single Judge ; and any proceedings after trial are, if possible, to be conducted before the Judge who tried the case. Contrary to the provisions of the English Act, each Judge is required to decide all questions coming properly before him. The Judges are given large powers as to making Rules, and are to meet once, at least, in every year, to consider the operation of the Act, and of the Rules of the Court for the time being in force, and are to report annually what amendments (if any) they would suggest.

By the Rules of Court, in the first schedule of the Act, it is provided that all actions are to be commenced by writ, on which is to be endorsed "a statement of the nature of the claim made, or of the relief or remedy required." If a writ is not served within six months from its date, it shall no longer be in force, unless leave to renew it is obtained. When a defendant appears to a writ specially endorsed, the plaintiff may call on him to show cause why judgment should not be signed for the amount endorsed, with interest and costs ; and unless the defendant shows good cause to the contrary the plaintiff may obtain leave to sign final judgment. In cases also in which the writ is endorsed with a claim for an account, such as an ordinary trust account, even though the defendant appears, an order for the amount claimed will be made, unless it is shewn that there is some preliminary question to be tried.

A uniform system of pleading is pro-

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vided, instead of the different methods in use in the different Courts. Every pleading is to contain, "as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved." It is provided (contrary to the English rule) that the "silence of a pleading as to any allegation contained in the previous pleading is not to be construed into an implied admission of the truth of such allegation." Local *venue* is abolished, but the plaintiff is to name, in his statement of claim, the place where he proposes that the action should be tried. Notice of trial is not to be countermanded, nor is the record to be withdrawn, except on consent or by leave of the Court or Judge. Orders may be made for the preservation or *interim* custody of the subject matter of any litigation, or, in the case of perishable goods, a sale may be directed. "No action shall be defeated by reason of the misjoinder of parties, and the Court may, in every action, deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it." All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist; and defendants may be joined in the same manner, and provision is made for joining defendants in cases of doubt, and for determining claims to contributions and indemnity as well between defendants as between defendants and persons who are not parties to the action. The intention of the draughtsman being "that, as far as possible, all matters in controversy may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

In introducing the Act of 1873, Lord Selborne said: "Of all our institutions there are none which excite a greater or more natural, or more profound interest,

than those which relate to the administration of justice. None tend more to bind together the whole fabric of society, and none are held in more general and just estimation and reverence by the people. And it may be for this reason that public opinion on these subjects is of somewhat slow growth, and they are relegated to a more serene region than that ordinarily devoted to polemical and political contests. All classes of men feel that they have a particular interest in these subjects being dealt with on sound and right principles, and, therefore, passion and excitement have but little place in the consideration of such matters."

Whilst we trust that the new Act may be considered by our Legislature and the legal profession in this spirit, we would urge upon the Government not to push the measure through this Session, as seems to be the intention. We have no doubt the Attorney-General has given careful attention to its provisions; but we are quite as certain that if the measure were in the hands of the Bench and Bar until next Session, a more perfect Bill could have been submitted. Suggestions hereafter made will be for the purpose of amending an Act then in force, instead of alterations in a draft Bill. Moreover, if that course were taken, much discussion and many explanations in the Legislature would be unnecessary; members would not be required to ask, what appear to the initiated to be very silly questions, and the Attorney-General be saved, possibly, from the disagreeable necessity of making alterations in his Bill, forced upon him by the clap-trap arguments of members, who, necessarily ignorant of the matter themselves, desire to represent the so-called views of constituents who, having still less knowledge of the matter, are led away by their prejudices, and their hostility to a

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state of things now found only in the pages of some old novel, or heard in the declamations of some disappointed suitor or loud-mouthed demagogue.

If there is any pressing demand for such a sweeping change as is now proposed, though this is not very clear, what would be wanted would be a well prepared measure, fully considered as well by the judges and profession as by the leaders, and the lawyers on both sides of the House, and then passed without any regard to the influences we have spoken of. We do not say that the Bill before us is not a well prepared measure; but it would be impossible without further time to examine minutely its details, to express any opinion or give any suggestions that would be of much practical value. We trust the Attorney-General will stay his hand for the present, or at least enact that the Act shall not come into force until after next session, so as to give an opportunity to make any amendments that may commend themselves to him in the meantime.

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(Concluded.)

Let us now turn to a few of the poetical productions of our author. He courts the Muses indifferently in Latin and in English; sometimes (we presume when he likes the idea) he gives it in both languages. When speaking of "Enchanters," he says:

Carminebus Circe socios mutavit Ulysses.

By charms in rhyme (O cruel fates!)
Circe transform'd Ulysses' mates.

And again,

Carmina de celo possunt detrudere lunam.

By rhymes they can pull down full soon
From lofty sky the wandering moon.

When discoursing on simony, Coke says: "I have read ancient verses concerning simony and other corrupt entries

into churches, which are not unnecessary, in detestation of them, to remember:

*Quatuor ecclesias portis intratur in omnes,
Cæsaris et simonis, sanguinis, atque Dei.
Prima patet magnis, nummo patet altera, charis
Tertia, sed paucis quarta patere solet.*

Four doors hath every church, and all but one
forebod—

(Whereof unseen some may be peradventure,)
Of Cæsar, simonie, of kindred and of God;

And each churchman by one of these doth enter:
Great men's command doth open wide the first;

At next by money enter many one,
The third to weak allies, but (for the church the
worst),

God's door doth open to a few or none.

In the chapter on buildings, we find a Latin translation by Sir Th. Moor (*sic*) of a passage in Euripedes, and an English version by Coke himself. The latter is:

To build many houses and many to feed,
To poverty that way doth readily lead.

In the same chapter we have a list of the "seven wonders of the world," which for memory, may be expressed in these few verses:

1. *Pyramides Memphis*; 2. *Bablonis mœniaculæ*;
3. *Templum ingens Ephesi virgo Diana tuum*;
4. *Mansio Carica monumentum*; 5. *Ravaque
Phære*
Turris; 6. *Olympiaci splendida imago Jovis*;
7. *Denique apud Rhodios splendentis statua Phæbi.*
Hæc septem mundi mira, viator habet.

Apropos of light-houses; pharos, sea marks or beacons, we find,

Lumina noctivagæ tollit pharus æmula lunæ,

In light house top is rear'd the light,
As high as the moon that walks by night.

The "distichons" that he quotes are numerous, and he frequently lays Virgil and Horace under tribute to point a moral or adorn a tale. In fact, although Coke affected to despise literature; yet—as a recent writer says—he was a pedantic and villainous verse maker. Among the papers seized by the Government, while he was on his death-bed, was one paper of poetry to his children. The beneficiaries lost nothing if the gift failed.

In the Natural Sciences Sir Knight was not very strong. When writing concerning the use of the craft of multi-

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plication, made a felony by 5 H. 4, ca. 4 (the shortest Act of Parliament that Coke remembered). He says "It is to be known, that there are six kinds of metallis, viz., *aurum, argentum, æs sive cuprum (quia inventum fuit in Cypro), stannum, plumbum, et ferrum*. That is to say, gold, silver, copper, tynne, lead, and iron; for *chalybs*, steel, is but the harder part of iron, and *orichalcum, aurichalum*, viz., lattyn or brasse, is compounded of copper and other things." Then he defines what is meant by "the craft of multiplication"—it is to change other metallis into very gold or silver. And this they pretend to do by a quintessence, or a fifth essence. Four essences or elements we know, fire, aire, water, and earth, but say they, this *quint essence* is a certain subtile and spirituall substance extracted out of things by separation from the four elements, differing really from their essence, as *aqua vitæ*, the spirit of wine, or the like, and this is called *elixar*, or the philosopher's stone, and is part of alchemie, or chemie, in Latine *ars chemica*. The offenders therein are called multipliers, chemists, alchemists, &c."

Next he gives the origin of all things mundane: "How these several kinds of metallis, as is supposed, proceed originally from sulphur and quicksilver, as from their father and mother, and other things concerning the same you may at your leisure read in George Agricola, lib. 10, ca. I.; Encelmas, li. I., ca. I, Pl. Com. 339. Almighty God in the fourth day created the earth, and no mention is made of metals, for they were as parts of the earth."

We learn from him that we may be "poysoned four manner of ways: *gustu*, by taste, that is by eating or drinking, being infused into his meat or drink; *anhelitu*, by taking in of breath, as by a poysonous perfume in a chamber, or other room; 3, *contactu*, by touching, and last-

ly, *suppositu*, as by a glyster or the like. Now for the better finding out of this horrible offence, there be divers of kindes of poysons, as the powder of diamonds, the powder of spiders, *lapis causticus* (the chief ingredient whereof is soap), cantharides, mercury sublimate, arsenick, roseacre, &c." Poisoning he considered the most detestable of all modes of murdering, "because it is most horrible and fearful to the nature of man, and of all others can be least prevented either by manhood or Providence." By 22 H. 8, c. 9, it was enacted that one guilty of this crime should be "boyled to death in hot water."

He knew a good deal about hawks however, and speaks glibly of goshawks, and sparrowhawks, and hawks long-winged and short-winged, falcons and gerfalcons.

Much curious and interesting information does our author give us. In the chapter on High Treason, we are given the names by which various Parliaments famous in the days of yore were known, such as, the foolish Parliament; the parliament of white bands; the good parliament; the parliament that wrought wonders; the great parliament; the lack learning parliament; the parliament of bats; the black parliament; the pious parliament; the happy parliament; the blessed parliament.

The rack in the Tower, we are told, was called the Duke of Exeter's daughter, because that nobleman introduced its use.

The difference between bigamy, trigamy, and polygamy is pointed out; "bigamy or trigamy is where one has two or three wives at different times and successively; polygamy where one has two or more at the same time. "By the ancient law of England," we are told, "that if any Christian man did marry with a woman that was a Jew, or if a Christian woman married a Jew, it was felony and

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the party so offending was burnt alive." "King Edgar allowed many Danes to settle in England; but as they were given to excessive drinking, the king was in the end constrained to make a law against this excess (which never cometh alone), driving certain nails into the sides of their cups, as limits and bounds, which no man upon great pain should be so hardy as to transgresse." In the reign of Henry VII. twelve houses of ill-fame were allowed in London, and these had signs painted on their walls as a boar's head, the cross keyes, the gun, the castle, the crane, the Cardinal's hat, the bell, the swan, &c.

The 99th chapter on Flattery, concludes with these words: "But parliaments, palaces of princes and pulpits, should be free from adulation and flattery." And in the margin, is "Not these three P. P. P."

Numerous little stories have we. Sir Walter Tirrel and William the Red, in the New Forest; Canute, his wicked flatterers and the sea wetting his lordly and majestic feet; the battle between David and Goliath; the single combats between French and English knights; Robin Hood and Little John; all figure in his pages together with divers and sundry others, too numerous to mention.

Philology was a favourite study with this Chief Justice, and the derivations of many legal words from Latin and Greek, Saxon and French, are given by him. For instance, we are told that "Robbery" is derived from "*de la robe*," both because in ancient times (as sometimes yet is done), they bereave the true man of some of his robes or garments, and also for that his money or other goods are taken from his person, that is, from or out of some part of his garment or robe about his person." "Murder" is derived from the Saxon *mord*. An "inchanter, incantator, is he or she "qui

carminibus, aut cantiunculis demonem adjurat." They were in ancient time called *carmina*, because in those days their charmes were in verse." Of "Usury," we are told, *usura dicitur ab usu et cere, quia datur pro usu aeris, or usura dicitur quasi ignis urens.* "Bribery" cometh of the French word *briber*, which signifieth to devour or eat greedily, applied to the devouring of a corrupt judge of whom the Psalmist, speaking in the person of God, saith, *qui devorat plebem meam sicut escam panis.*

His disquisitions in Political Economy are numerous. "The full end of these five are beggary, the alchemist, the monopolist, the concealer, the informer and poetasters. I could give examples (of mine own observation) of all these if it were pertinent to our purpose." "Three costly things there are that doe much impoverish the subjects of England, viz, costly apparell, costly diet and costly building. The best mean to repress costly apparell, and the excess thereof, is by example: for if it would please great men to show good example and to weare apparell of the cloth and other commodities wrought within the realm, it would best cure this vain and consuming ill, which is a branch of prodigality, and herewith few wisemen are taken. If you will looke at the parliament roll of 2 H. 6, you shall see what plain and frugall apparell that renowned King H. 5., after he was king, did wear, his gowne of lesse] value than 40s."

Perhaps Sir Edward would have liked the Spartan rule by which only a single garment each year was allowed to males over twelve years of age.

After speaking on the laws against excessive eating and drinking, our author concludes with, "nothing is here said against that great peacemaker and branch of liberality, orderly hospitality,

but against the dainty and disorderly excesse of meat and drinks, which is a species of prodigality: for it is provided by act of parliament that the grace of hospitality shall not be withdrawn from the needy."

"We have not," he says, "read of any act of parliament now in force made against the excesse of building; but it is a wasting evill whereunto some wise men are subject. Of these three it hath been truly said: *vestium, conviviorum, et edificiorum luxuria ægre civitatis sunt indicia et species prodigalitas.*"

His English pride of country appears when he gravely writes, "We have observed that God hath blessed this realme with things for the defence of the same and maintenance of trade and traffick, that no other part of the Christian world hath the like, viz., iron to make gunnes, &c., more serviceable and per-durable than any other. Secondly, timber for the making and repairing of our navie, and especially of the knees of the ships, better than any other. Thirdly, our fuller's earth is better for the fulling of our cloth, than any other. Fourthly, our wooll makes better cloth, and more lasting and defensible against winde and weather, than the wooll in any nation out of the King's dominions; and many other speciall gifts of God."

Sir Edward had no liking for vexatious informers and permooters upon penall statutes; he dips his pen in gall and writes, "You have heard of four viperous vermin, which endeavoured to have eaten out the sides of the church and commonwealth: three whereof, viz., the monopolist, the dispencer with public and profitable penall lawes for a private, and the concealers are blowne up and exterminated; and the fourth, viz., the vexatious informer, well regulated and restrained, who under the reverend mantle of law and justice instituted for

protection of the innocent and the good of the commonwealth, did vex and depauperize the subject, and commonly the poorer sort, for malice or private ends, and never for love of justice."

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

From Armour J.]

[Jan. 14.]

IN RE ARBITRATION CREDIT VALLEY
RAILWAY AND GREAT WESTERN RAIL-
WAY.

*Arbitration—Appeal from award under
Railway Act.*

Arbitrators appointed under the Rail-way Act to determine the compensation to be paid by the Credit Valley Railway to the Great Western Railway in respect of the exercise of their power of crossing the latter railway under sub-sec. 15 of sec. 9 of the Act, made an award on the 30th December, 1877. On the 19th February the Great Western Railway Co. obtained a rule *nisi* to set it aside, and also took steps to appeal against it under sec. 19 R. S. O. c. 165, by filing a bond for security for costs, but did nothing else within the period of one month after the notice of the award. *Held*, dismissing the appeal, that this was not a submission to arbitration within 9 & 10 Will. III., c. 15, or section 200 of the C. L. P. Act; but even if it were the motion for a rule *nisi* to set aside the award should have been moved for before the last day of the term next after the publication of the award; and that the appeal from the award was too late, as the giving security was not a commencement of the appeal within the meaning of the above section.

McMichael, Q.C., for the appellant.

Boyd, Q.C., for the respondent.

Appeal dismissed.

C. of A.]

NOTES OF CASES.

[C. L. Cham.

From Proudfoot, V. C.] [Jan. 14.

PARDEN v. LLOYD.

Award—Consent reference—Time—Motion to set aside award.

A reference to arbitration had been made by the consent of the parties, and the award of the arbitrator was made in August, 1878, and published before Trinity Term of that year.

The plaintiff moved against the award in November, 1878, before V. C. Proudfoot, who set it aside, the defendant objecting that the motion was made too late.

Held, reversing the judgment of the Vice-Chancellor, that the motion should have been made before the last day of Trinity Term.

From Proudfoot, V. C.] [January 14.

GREEN v. PROVINCIAL INSURANCE CO.

Deposit by Insurance Company—Creditors entitled to rank therein.

The defendants were licensed under 31 Vict., c. 48, to transact fire and inland marine insurance, while their original charter authorized the transaction of fire and marine insurance without distinction of ocean from inland marine.

Held, affirming the decree of Proudfoot, V. C., that the holders of ocean marine policies, though resident in Canada were not, on the insolvency of the defendants, entitled to rank as creditors on the fund deposited and remaining with the Government of Canada.

Miller and Biggar, for the appellants.

McCarthy, Q. C., and *Creelman*, for the respondents.

Appeal dismissed.

[Jan. 15.

NORVAL v. CANADA SOUTHERN RAILWAY COMPANY.

Award—Misconduct of Arbitrator.

The fraudulent, improper, or malignant conduct of the arbitrator alone, without any collusion with the person seeking to enforce the award is no defence to an action upon the award.

Crooks, Q. C., and *Cattanach* for the appellant.

Blake, Q. C., and *Boyd*, Q. C., for the respondent.

Appeal dismissed.

From Moss, C. J. A.] [January 20.

McPHERSON v. McKAY.

Presbyterian Church of Scotland—Union—Congregational Property.

In 1836, by letters patent, lands were granted to trustees in fee, to hold the same to and for the benefit of the Presbyterian minister for the time being, Incumbent of the Presbyterian Church of Scotland, then erected in the Township of Eldon. The defendant who had always been a member of such Presbyterian body, was duly inducted as Incumbent of the said church, and so continued, when in 1875, an Act of the Legislature of Ontario was passed for the Union of the several Presbyterian churches then existing in Ontario; but the members of this church voted themselves out of the said Union as provided by the Act, notwithstanding which the defendant gave in his adherence to the Union.

Held, affirming the judgment of the Court below, that, under these circumstances, the lands granted by the said patent, as also the church and other buildings erected thereon, belonged to, and were the property of the congregation, and that the defendant having joined the Union was no longer entitled to hold possession or receive the benefits of the same.

MacLennan, Q. C., for the appellant.

A. MacLean, for the respondent.

Appeal dismissed.

COMMON LAW CHAMBERS.

Armour, J.]

[December, 1879.

THE DOMINION TYPE FOUNDING COMPANY v. NAGLE.

Execution—Sheriff's costs—Taxation.

Held, that a Sheriff's bill of fees may be taxed on notice under sec. 48 of the Execution Act, R. S. O., c. 66, either at Toronto, or in the Sheriff's own county, as the party taxing may elect.

C. L. Cham.]

NOTES OF CASES.

[Chan. Cham.]

Oaler, J.]

[December, 1879.

BUTLER V. ROSENFELDT ; SWEETZER
V. ROSENFELDT.*Capias—Foreigner—Arrest.*

It is against the policy of our law to permit one foreigner to follow another into Ontario and arrest him under a writ of *capias*, upon a debt contracted abroad. But this rule is limited to those cases in which it appears that the debtor is about to return to his own country. Where the debtor intends to remain in Ontario, the creditor may arrest him on a proper case made out.

Mr. Dalton, Q.C.]

[December.

HUGGINS V. GUELPH BARREL CO.

*Special endorsement—Common counts—
Particulars.*

The particulars of claim upon a writ of summons specially endorsed do not bind the plaintiff as particulars under a declaration on the common counts, and in such a case he must comply with a demand for particulars made by the defendant.

Hagarty, C. J.]

[January 20.

HAGLE V. DALRYMPLE.

*Prohibition—Jurisdiction of Division Court
—Cause of Action.*

The defendant who resides at Port Elgin, had written to the plaintiff at Toronto a letter, instructing him to take certain legal proceedings, which proceedings were taken. The plaintiff sued the defendant for his costs in the First Division Court of York, at Toronto. The defendant was held entitled to a writ of prohibition to this Division Court, on the ground that the whole cause of action did not arise at Toronto.

Mr. Dalton, Q.C.]

[January 20.

WOODMAN V. BLAIR.

*Costs—Examination of parties—Breach of
promise of marriage.*

The parties in an action for breach of promise of marriage not being competent or compellable witnesses for each other, the

plaintiff was not allowed the costs of an examination of the defendant under an order to examine. But the plaintiff's costs of his own examination were allowed, as this took place at the instance of the defendant.

CHANCERY CHAMBERS.

Blake, V. C.]

[September 23, 1879.

ENGLISH & SCOTTISH INVESTMENT COMPANY
V. GRAY.

This was a suit on a mortgage (containing a covenant to insure) against the original mortgagor and mortgagee, the latter having assigned to the plaintiff and covenanted for payment.

The bill had been served on both defendants, specially endorsed, claiming amount due up to the filing of the bill with subsequent interest. Since the service of the bill the plaintiffs had paid certain premiums of insurance which they claimed to have allowed in the decree. Assistant-Registrar McLean declined to allow the premiums or receive evidence of payment because not covered by the endorsement. One of the defendants, the mortgagor, lived in the country, and the other, the mortgagee, in Toronto.

Kwart, for the plaintiff, asked for the direction of the Court under the circumstances.

BLAKE, V. C. directed notice of settling decree and taking account to be served on the defendant living in Toronto, and that the claim of plaintiff for the premium should be allowed on proper evidence being produced of its payment.

Blake, V. C.]

[September 23.

YOUNG V. WRIGHT.

McArthur, for the plaintiff, moved for an injunction to restrain the defendant from collecting rents, and for a receiver. Notice of motion had been served for an order for partition under General Order 640, which was returnable on the 6th October following.

Moss, for the defendant.

BLAKE, V. C.—It appears on the affidavits that the defendant now sought to be restrained is not one of the joint owners, but a stranger in possession, whose title to be in possession at all is denied. No relief can be had against him on motion without a bill filed. There must be some proceeding in the nature of an ejectment to oust him, and that relief cannot be granted on a summary application under Order 640.

Application dismissed with costs.

Blake, V. C.] [December 15.]

RE HOPKINS—BARNES V. HOPKINS.

Dower—42 Vict. c. 22.

H. being possessed of some lands executed mortgages of them. Some of them were given to secure unpaid purchase money, and others to secure the payment of money lent to H. The wife of the mortgagor had joined in the mortgages to bar dower.

H. having died intestate :

Held, on the sale of lands under decree, directing a sum in gross, in lieu of dower, to be paid to the widow, that she was entitled to dower out of the whole amount realized from the sale, after deducting therefrom the amount of the mortgages given by H. to secure unpaid purchase money, but not of the other mortgages.

Blake, V. C.] [December 16.]

COOK V. CREDIT VALLEY RAILWAY.

Sequestration—Motion for—Length of Notice.

On moving for a writ of sequestration for breach of an injunction, two clear days' notice of motion is sufficient.

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Sheriff's Fees and Mr. McKellar's Pamphlet.

To the Editor of THE LAW JOURNAL.

SIR,—A pamphlet has lately been issued and forwarded to the Ontario Government by Mr. McKellar, the Sheriff of Wentworth, having for its object, the redress of the grievances to which he alleges Sheriffs are subjected. This pamphlet contains a copy of

a petition signed by thirty-four out of thirty-seven Sheriffs of Ontario, to be presented to the Legislative Assembly at its present session, setting forth what these alleged grievances are, and Mr. McKellar has appended a draft of a proposed Bill, which he hopes to have passed by the Legislature, in the exclusive interest of Sheriffs; and the pamphlet also contains, what Mr. McKellar considers to be ample proof of the genuineness of the alleged grievances, and conclusive reasons for the speedy interference of the Legislature in behalf of himself and of the Shrievalty throughout Ontario.

Mr. McKellar refers to individual members of the legal profession as "Good honest Charlie," "The Saintly Lauder," "Good Old Rye," "Truly thou art a Deacon fearfully and wonderfully made," and, by covert insinuation, would revenge himself upon gentlemen, who have dared to combat his views upon the subject under discussion. Such "throwing of scurrilous and abusive terms" may, for aught I know, most truly be in keeping with the individual who uses them, and be most becoming to the man; but, for a little while, could not the Sheriff of Wentworth have lost self-consciousness and, mindful only of his official character, abstained from language so undignified in the holder of an important Shrievalty.

The gentleman refers to two bills of costs as proving the truth of what his pamphlet asserts; one in a suit of *Watson v. Servos* (p. 20), the other in a suit of *Suter v. Servos* (p. 21), and he relies upon the taxation of the County Court Clerk of Waterloo in each of these two cases. In *Suter v. Servos* this Clerk allows a charge, and in *Watson v. Servos*, this same charge this same Clerk disallows. Truly this Clerk must be a competent officer, when, upon the faith of this taxation, Mr. McKellar ventures to send broadcast the accusation that Mr. Dalton McCarthy's law firm charged and obtained fees to which they were never entitled. Then Mr. McKellar (may I hope unintentionally) directly misleads the readers of his pamphlet. Take, for instance, the case he refers to, that of *Watson v. Servos*; the Clerk, in that case, it appears (vide p. 20 of the pamphlet), taxed off the sum of \$2.73.

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Now Mr. McKellar seeks to leave the impression that this sum of \$2.73 was charged by the Attorney for the serving of process. He says (p. 20), "Although Mr. Rye's office is within a stone's throw of the Sheriff's office, he does not give him the writ, but employs one of his own clerks, as he tells us, and collects \$2.73 for his services, while the Sheriff would have got only \$1.80." Now the gentleman Mr. McKellar refers to, *did not collect \$2.73 for his clerk's services, and no where in the bill printed is there any such charge, or any charge at all for the serving of process*, and Mr. McKellar must so have been aware, and should not have put into circulation statements, hazardous to himself, and injurious to the gentleman he refers to.

In the case of *Suter v. Servos* (p. 21), there does appear a charge for services of \$1.00; this item was taxed off, and properly so, and I am free to admit the lawyer ought not, in law, to have made this charge, notwithstanding he did the work; but, Mr. McKellar does not admit that if this service had been performed by the Sheriff, it would have cost the defendant not \$1.00, but \$1.80. Mr. McKellar pointedly draws attention to the fact that "if the summons had been served by the Sheriff, he would have been entitled to \$1.80, and no more;" but he adroitly places these words beneath the Clerk's certificate of \$5.25 as being the *total amount* taxed off (with a purpose no doubt), instead of admitting that in this case the defendant was saved 80 cents by the lawyer, instead of the Sheriff doing the work.

In the case of *Bishop v. Douglas* (at p. 23), the services of Mr. McKellar's favourite C. C. C. were again brought into requisition, and the sum of \$2.25 taxed off. Though there is no charge made here for serving process, Mr. McKellar again has the clerk's certificate appended, drawing attention to the difference between the \$2.25 taxed off, and the \$1.80 which would have been the Sheriff's fees, had he served the process. Then (at p. 24) Mr. McKellar sets out a bill of costs in *Smith v. Mercer*, in which, it appears, service of writ was charged for at 50c, by the law firm of which Mr. Hardy

is the head. Mr. McKellar neglects to say that, had the Sheriff served the writ, the client would have had to pay, in addition to the total amount taxed off, the difference between 50c and \$1.80, viz., \$1.30; but he seeks to attract attention solely to a comparison between the \$1.80, and the total amount taxed off the bill, viz., \$5.25. Instead of increasing the taxed bill by the sum which it would have cost to have the Sheriff serve the process, Mr. McKellar artfully points out what has been taxed off the bill, and says "Look! see what the lawyers would rob you of. Now were the Sheriff to do the work only \$1.80, would you have had to pay." In only one instance, does Mr. McKellar fail to adopt this plan, and that instance was in the case of *McNair v. Goering* (at p. 9). Here, he does single out what was charged for serving of papers, and explains that the sum of \$13.37 was charged for his own services as Sheriff, when, the fact was, the services were not performed by him at all. I do not defend the conduct of Mr. Cahill. If what is stated of him be true, I should not wish to be forced to write words to characterize his actions; but, even in this case, there would seem to have been some justification for Mr. Cahill's course, in an understanding about the matter between Mr. Cahill and *Mr. McKellar's own Deputy*. Yet, however that may be, Mr. Cahill will no doubt, deem it wise to "rise and explain."

Mr. McKellar's argument is that lawyers charge for the serving of papers, when by law they are not entitled to do so, and therefore the Legislature ought to positively prohibit these services being made by any one but Sheriffs. Now I will not contend that lawyers are infallible. I will admit that there are lawyers who are dishonest, who charge what they are not entitled to charge, and who take fees they ought not to take (will Mr. McKellar admit the same thing of some Sheriffs?); but I fail to see the logic by which he arrives at the conclusion that the cure for the evil is in making the Sheriff receive the fees whether he does the work or not. Mr. McKellar treats of the alleged evil, not as against the moral law but as against the public interest.

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Taking his standpoint, then, the evil will remain the same (if a change is made) for the public, instead of paying Peter, will have to pay Paul. What in the past they have paid the lawyers (as it is alleged), in the future, they will have to pay the Sheriffs. But the fact is, any change in the direction Mr. McKellar proposes, will increase the evil against the public, if any such now there be. There are but few of the profession who exact fees which they are not entitled to, instances are rare, and it therefore is the exceptional suitor only, who suffers from business contact with such of the profession; and he, be it understood, has his remedy, but how will it be if Mr. McKellar's wishes are fulfilled. Then, in every single suit in which a writ is issued or a bill filed and served, the suitor will have to pay a fee. Kith and kin all alike must pay. The Sheriff charges the lawyer, and the lawyer charges the client. The lawyer collects, and the Sheriff receives. What now is a rare exception, then will become an unexceptional rule. The public can the better understand the effect of Mr. McKellar's proposed legislation by a comparison of his own figures taken from his pamphlet. At p. 28 it appears that the number of bills in Chancery and writs of summons issued in the year 1876 was 20,380. Of this number Mr. McKellar admits that 11,066 were served by Sheriffs, leaving a balance of 9,314, which he alleges were served by attorneys. The fee for service of each of these 20,380 was Mr. McKellar says (at p. 28) as follows:

S. C. process,	6,556 at \$2 70 =	\$17,701 20
I. C. "	11,245 at 1 80 =	20,241 00
Chan. "	2,579 at 2 25 =	5,802 75
		<hr/>
	20,380	\$43,744 95
		<hr/>

Now, had the Sheriffs served the entire 20,380, the public would have paid, and the Sheriffs received the moderate sum of \$43,744.95: from this one source alone, an average sum of \$1,182.29 for every Sheriff in Ontario. Mr. McKellar's shrievalty, however, is a large one. His own figures (p. 27) shew what he would have received

from this one source, exclusive of any charge for mileage, for the year 1876:

S. C. process,	404 at \$2 70 =	\$686 80
I. C. "	779 at 1 80 =	1,402 20
Chan. "	163 at 2 25 =	666 75
		<hr/>
		\$2,755 75
		<hr/>

Close on to \$3,000.00 to Mr. McKellar for merely serving writs and bills alone; and this is the man who is not satisfied. But Mr. McKellar says, the attorneys served the balance, viz.: 9,314. Admitting this, for one moment, then the public saved the nice sum of \$20,506.05 by the attorneys, and not the Sheriffs doing the work, according to his own figures, as follows:

S. C. process,	3,511 at \$2 70 =	\$9,479 79
I. C. "	4,512 at 1 80 =	8,121 60
Chan. "	1,291 at 2 24 =	2,904 75
		<hr/>
		\$20,506 05
		<hr/>

Or the difference in fees, for what work the Sheriffs did do, and what they might have done if, in 1876, Mr. McKellar's sordid legislation had been on the statute book. But Mr. McKellar gets over this view of the matter by flatly asserting that this \$20,506.05 "has been collected by the profession, with much more, as shewn by the taxed bills of costs herewith published" (p. 28). This I as flatly deny; a small fraction of this amount may have been collected by irresponsible lawyers, as I have before admitted; but, when he says the entire \$20,506.05 "has been collected by the profession, with much more," he writes whereof he knows naught. What allowance has he made for the numerous cases in which writs and bills were issued, and nothing more was done. He says the total number of writs and bills issued in 1876 was 20,380, of which 11,066 were served by the Sheriffs, therefore this allowance must be deducted from the 9,314 alleged to have been served by the attorneys. Thirty per cent. of this 9,314 (or ten per cent. off the number in each Court), is not too much to put this allowance at, reducing thus, the sum of \$20,506.05, alleged by Mr. McKellar to have been "collected by the profession, with much more," &c.,

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&c., to this sum of \$14,354.24. But a still further reduction has to be made; Mr. McKellar makes no allowance for that proportion of suits, which did not end merely with the issuing of process, but which were continued on to judgment, and in which the litigant had the protection of the taxing officer's taxation. In such suits, if a charge for serving process was made the charge would be disallowed by the Clerk, and the attorney would lose the charge for his services, or that sum which he had paid to others for doing work, for which the Sheriffs only can be paid as against the litigant. Now, of the total number, alleged by Mr. McKellar, to have been served by the attorneys, fifty per cent. is not too much to put this proportion at, therefore the above mentioned sum of \$14,354.24 has still further to be reduced by fifty per cent. of the \$20,506.05 "alleged to have been collected, with much more, &c." The amount collected by the attorneys therefore, on Mr. McKellar's own figures, in place of being \$20,506.05, would be \$4,101.21. Now, admitting for a moment that the profession did collect this \$4,101.21, they did so, Mr. McKellar does not deny, for services duly rendered; the exact services, in fact, for which the public would have had to pay the Sheriffs, had they done the work, the sum of \$20,506.05. But, again, is it fair or just of Mr. McKellar to say that the profession collected even the \$4,101.21? He offers no proof, but that of his own assumption. What Mr. McKellar puts to paper, he must either believe, or dis-believe, to be true. If the former be the case, then he assumes that lawyers are all dishonest; if the latter be the case, then he proves himself as bad as one of the legal gentlemen of whom he writes. Mr. McKellar, however, does not so assume against the profession. The petition of the Sheriffs, to which his name is subscribed, negatives such an assumption. It seeks to be laudatory of them (4th par.), with an object to be suspected, but not to be mentioned; but the class he refers to, "whose practices he desires to bring under the notice of the House," he singles out in the 5th par. of the petition. So that even this sum of \$4,101.21 has to be lessened.

It has to be reduced, by the proportion towards it, which those of the profession bear, who are within the 4th par. of the petition, and to the practices only of this particular class who come within the 5th par. of the petition. The reduction will be a large one and the balance, improperly collected, small indeed, for after the lapse of *two years*, "during which time," Mr. McKellar tells us in his own words, he "has made most diligent inquiry;" he is in a position to point out eight bills of costs, and on the strength of these eight bills of costs, taxed by the aforesaid County Court Clerk of Waterloo, Mr. McKellar deliberately charges that the profession has collected improperly and illegally \$20,506.05, "and much more." These eight bills of costs, however, do not prove it, and Mr. McKellar knows it. They prove however something, and that is, that litigants, if they are improperly charged, have a remedy. As Mr. McKellar had the the aforesaid bills taxed, so can any individual who is dissatisfied with the charges of a solicitor. A client or litigant always could, and still can, have his bill taxed, and, if a member of the profession lends himself to dishonesty his earthly punishment will come fast and furious from the Society of which he is a member. Then, too, the law being that, unless the service of process is performed by the Sheriff, no fee therefor can be taxed (with which Mr. McKellar is not content, but wants more), the taxing-officer disallows the charge if made, and in the majority of cases bills of costs go before the Master for taxation. Again (at p. 38), Mr. McKellar's figures are inaccurate and designed to mislead. It appears that, in each of four suits, Division Court Clerks were employed to serve papers, and Mr. McKellar would have the impression formed that the fees charged by these clerks, were extracted from the litigant by the attorney. It is more than likely that, in each of these cases, the attorney forfeited the fee charged, as is constantly the case, as all lawyers know, when the loss of this fee is better than the risk of delay or other inconvenience in connection with service by the Sheriff.

Enough has been said to shew the utter unreliability of Mr. McKellar's pamphlet;

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but Mr. McKellar out-herods Herod at pp. 30, 31. He gives a list of 18 writs of execution, in each of which the Sheriff is commanded to levy *for the issue of the writ* much more than the law allows. The total amount he says was \$153, which the taxing officer reduced to \$56.33. Mr. McKellar, for what reason I don't know, except it be to mislead by an unfair comparison, shews that had the summonses, in each of these cases, been served by Sheriffs, the Sheriff's fees would have been \$37.80, to which he adds the above \$56.33, making a total of \$94.33, and then says by the collection of the \$153 the attorneys were collecting "their own fees, the Sheriff's fees, and a further sum of \$58.57." What could be more absurd! why not one cent of the \$153 is made up by a Sheriff's fee. The absurdity appears the greater when it is noticed, as the fact is, that had the Sheriffs served the summonses and earned their fees therefor, the charges on the writs of execution would have been none the less, for the two things are wholly disconnected. He might as well argue that if a merchant, who serves his own process, and finally issues execution for a debt, only half of which is due him and collects it, this merchant, forsooth, by so doing is collecting fees to which the Sheriffs are entitled. The cases are analogous. Because a lawyer charges improperly, is the law to be made more expensive to the suitor, and still more remunerative to the Sheriff, in order to prevent the lawyer from wrong-doing. In each of the above cases, the defendant could have declined to pay the improper charge, and neither the attorney nor the Sheriff could have compelled him to do so; but because the defendants refused (if they did so refuse) to exercise their rights in so declining, Mr. McKellar argues that the Legislature should step in and increase his fees, by compelling everybody to employ Sheriffs to serve papers.

From Mr. McKellar's pamphlet throughout but one conclusion can be come to, viz.: that he desires to attain his ends at any cost. The ends are sordid, and the cost deliberate misrepresentation. He seeks to gain advantage of the unhappy

prejudice against the profession, and would increase that prejudice that he might gain. His text, Mr. McKellar trusts, the non-professional members of the house will not see through; but the figures, he hopes, will catch their eye. His comparisons he hopes will go unexplained; but his misstatements he wishes to be received as true. He writes unfairly, unjustly, dishonestly of the legal profession, that he may gratify the feelings of those already biased against the profession. He strives to lower the legal fraternity, and all from an insatiable love of gain, that he may increase the emoluments of his office, already the best and most remunerative office in the gift of the Province. I myself am opposed to the profession serving process, and fully agree with Mr. McKellar that doing so is "beneath the dignity which should characterize members of the legal profession;" but there are instances when the profession are compelled to serve their own process. Take the ordinary case of subpoenas. Ten days' notice of trial is given. You have eight or ten witnesses. You rush off and get a subpoena, make your copies and appear at the Sheriff's office. You find there five or six lawyers ahead of you on the same errand as yourself, each of whom must have his witnesses served at once: witnesses are going away, others trying to evade service, and so on. The Sheriff gladly does what he can; but finds it impossible to travel round and summon fifty or sixty witnesses in ten days' time, and so you appear at Court with your evidence unprepared, and torment the presiding Judge with applications for delay. But Mr. McKellar provides in his Bill (sec. 2) for service by persons other than Sheriffs. Truly his proposal is a generous one! The same lawyers at a later period again appear at the Sheriff's office, each of whom presses eagerly for the prompt service of his subpoenas. "Very sorry, gentlemen," says the Sheriff, taking his pipe for a smoke, "my bailiffs are all, you know, busily occupied just now; serve the subpoenas yourselves, gentlemen, serve them yourselves; but mind you comply with the second section of McKellar's Act, and come to me within twenty-four hours."

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after the service, with the writ. For, you know, nowadays, the Sheriff is "entitled to the like fees, to which he would have been entitled, had the service been effected by himself or his authorized bailiff, or officer." "Surely not," reply the lawyers in one voice, "that cannot be McKellar's Act; Mr. McKellar was a Reformer, and he never would permit one man to be paid for the work another does," "That may all be true, gentlemen," answers the Sheriff, "but office, gentlemen, is a strange metamorphoser, and the law is as I say; in fact I have concluded to discharge my deputies and bailiffs, and hereafter I shall allow the profession to do the work, and I shall draw the pay, under McKellar's Act you know; and if I find any of you gentlemen neglecting, within twenty-four hours, to return the writ to me, that I may charge you for your services, I shall have you fined for the first offence, \$10; and for the second and every subsequent offence, \$20; and, in default, I shall have you put in prison, gentlemen, for one or two months as the case may be." "Can such things be," says one legal gentleman, "and did Mr. Mowat pass such a law." "He did indeed," replies the Sheriff. "Then," asked the leading lawyer, turning to his professional brethren, "Is it not time that we lawyers should amalgamate, and we shall certainly do so, to put down this Sheriff-legislation, and if we fail in our efforts, we must go in and have class legislation also."

The whole of Mr. McKellar's Act is designed to increase Sheriff's fees, and not to protect or save the public. The latter have protection now, but if they have not, the proposed Act will not benefit them, but, as I have shewn, will take more money out of their pocket. I submit, if legislation is needed, it is to protect the public, and not to enrich the Sheriff. If but one man a year is defrauded by improper legal charges, the matter is deserving of legislation, if, without it, the evil cannot be stopped. The public have a remedy now; but it is said they don't apply it. They have themselves to blame then; but if legislation is needed, let the Common Law Procedure Act be amended, and make it compulsory that

all bills of costs be taxed; then the affected (*but not the real*) cause of Mr. McKellar's agitation will be securely removed; and the few dishonest lawyers kept in check, and prevented from overcharging by the allocation of the taxing officer.

It is a strange incongruity, that while almost any man has sufficient capacity to perform the duties of a Sheriff or a Registrar, and only a certain few are qualified to make a Judge, yet the Sheriffs and the Registrars, with few exceptions, are in receipt of salaries of twenty-five and fifty per cent. in excess of those of County Court Judges. Legislation here is needed, but not to increase Sheriff's emoluments.

Mr. McKellar, in his preface (p. 4), says the object of his Act is: 1st. "To surrender ten per cent of the Sheriff's fees to the public, to be given to the municipalities," &c. Very good! *but no mention of any such object is made in his proposed Act.* And his own words shew that his object is not a disinterested one. He says (at p. 32), "acting on the old adage that 'half a loaf is better than no bread, they (the Sheriffs) believe it is better to surrender ten per cent, and secure thirty-five or forty per cent of the fifty they now lose.' The Legislature should take Mr. McKellar at his word, and curtail Sheriff's emoluments, in the way they have done Registrar's (see Rev. Stat. O. cap. 111, p. 1091); but, instead of surrendering the surplus fees to the municipality, the Legislature should enact that they be deposited to the credit of a fund to be called the "Sheriff's inspection fund," the object of which would be to provide a salary for, and to defray the expenses of an Inspector of Sheriff's Offices. We now have an Inspector of Registry Offices, of Division Courts, and of sundry other offices. It is much more important to have inspectors of those offices, in which such large sums of the moneys of the people are received and paid out,

Yours, &c.,

Jan. 12th, 1880.

B.

CORRESPONDENCE

Unlicensed Conveyancers.

To the Editor of THE LAW JOURNAL.

DEAR SIR,—Your last number contained a communication on this subject. I must say that every word in it is true to the letter. In this place there are three so-called conveyancers, and who call themselves “lawyers,” so much so that the more ignorant persons (and there are lots) will say, “let us go to lawyer so-and-so,” meaning the “scribblers.” He will do it for less than Mr. Doe, the professional man, and that which makes many think they are lawyers is this—they are often “Commissioners in B.R., &c.,” and they show this parchment or commission, which fully convinces the ordinary mind—and when we say he is not a lawyer, the reply is, “yes he is. I saw his diploma. He said he was.” What I say is, that those commissions should be cancelled. I must add my voice to that of “An old subscriber.” Mr. G. of this place does a great deal of conveyancing, and the people suppose it is all correct, because he gives them a blank filled up, and with a flourish of trumpets, administers the oath to the witness of its execution. This is a cause of injury and complaint of long standing, and is often referred to. I certainly think the Government should do something to aid the profession, as against this evil; and for the general good, if nothing else, take away this commission for administering affidavits, and give it to persons who are above this pettifogging. Why should we be called upon to go through five years’ study, and pay yearly fees for that which is practically a myth.

Yours,
SUBSCRIBER.

To the Editor of THE LAW JOURNAL.

SIR,—The very sensible letter which appeared in the last issue of THE LAW JOURNAL, on the above subject, and your comments thereon have induced me to add my protest to the existing state of things.

I think the time has come when it is necessary for the Ontario Legislature to interfere, in the interests of the legal pro-

fession, and more particularly those practising in outlying country towns, to protect them from the inroads of self-styled “Conveyancers,” *et hoc genus omne*, who swarm throughout the rural portions of the Province, and who, while they pass no examinations, and pay no fees whatever, materially injure legitimate business, by under-bidding lawyers in the drawing of instruments, the legal import of which not one-fourth of them understand. Could not Mr. Mowat, among his other gigantic schemes of Law Reform, pass an Act somewhat similar to Imperial Statute, 44 Geo. III., cap. 98, section 14 of which prohibits unlicensed persons from drawing or preparing any conveyance, &c. (wills excepted), for reward, under a penalty of fifty pounds? and could he not also require non-professional persons who desire to practise “conveyancing” to first pass an examination before the County Court Judge, and obtain a certificate from him, as provided with respect to Notaries Public, by R. S. O., cap. 141, sec. 3; and also compel such persons to pay a reasonable fee, either annually or otherwise, for such privilege? Certainly *something* ought to be done to prevent legally qualified men from being deprived of their proper work, and poor and perhaps ignorant people from being involved in costly litigation by the blundering of incompetent persons.

Would it not also be proper to prohibit County Court Clerks (who are custodians of all instruments relating to chattels, as Registrars are of instruments relating to lands), from practising as Conveyancers during their tenure of office, as the latter are prohibited by R. S. O., cap. 3, sec. 19?

Some of our readers might be surprised to see letter paper with the following “legal” heading, emanating from the office of one of these gentlemen, but I vouch for its accuracy:

“Notary Public, Conveyancer, Office,
Commissioner for taking Court House,
affidavits in B.R., &c., &c., &c.18.”

The three several *et ceteras* refer, I presume, to the “Justice shop” of a J.P., a usurious system of money lending, and an agency for the collection of petty accounts,

CORRESPONDENCE.

which this individual carries on, in conjunction with his official and "conveyancing" business.

Yours, &c.,
Lex.

To the Editor of the LAW JOURNAL.

SIR,—I have read with some satisfaction the letter of "An Old Subscriber" in your issue of this month. My case is somewhat similar to your correspondent's. He has practised nine years in a country town; I have practised at least eighteen. There are two other professional men in our town, as in his; he has to contend with three conveyancers, and I, alas! with thirteen.

Lest my assertion of the number of conveyancers in full blast here should be incredible, I forward an issue of our local newspaper, in which you will find the advertisements of seven of them; the others as surely exist, although they do not advertise.

The leading professional men, occupying places in Parliament, principally hail from large centres. Blunders by conveyancers bring grist to their mill. The conveyances drawn in the country would never be drawn by, or be a source of revenue to, them; therefore it may, as "An old subscriber" states, be assumed that any application to the Local Legislature would be ineffectual if the object were to restrict *soi disant* conveyancers.

These gentlemen do not confine themselves to the filling up of blank forms, and receiving pay therefor; but strike out into other fields of legal labour, such as practising in Division Courts, and in the Surrogate Court. One at least attends every funeral within twenty miles; is said to hunt in couples with the tomb-stone man, whose business it is to attend on those melancholy occasions. "You will have some surrogate work to do," he suggests to the survivor, entitled to probate or administration. "No use going to lawyers; they are great rogues. I am an honest man, and will put *thy* business through for one-half of what it will cost thee, if thou employest a lawyer." So he gets his in-

structions, prepares the papers, leading probate, or administration; sends them to Surrogate Registrar, in name of applicant, and pockets the fees, which I must do him the justice to observe, are not less than would be charged by a lawyer.

Take Division Court, Surrogate, and conveyancing business from a country practitioner, and what is left? He is pretty nearly reduced to the condition of the Robin Redbreast described by somebody as "*Vox, et preterea nihil*," and I would say to country practitioners, let us raise our voices, and endeavour to obtain some recognition of rights, supposed to be secured by long and arduous study, good conduct, the expenditure of large sums of money in fees and in annual subscription to maintain the dignity and efficiency of the Law Society.

That magical name should be suggestive of hope; but when we look back and see what that Society has not done for us; how, in return for our annual subscriptions, it has not fostered our interests; how it has not attempted to protect us against interlopers; how it remains utterly indifferent, and allows without interference its creations to be placed at a disadvantage, then hope from that source almost ceases to exist.

I am fully aware that I render myself liable to the charge of temerity (and feel the sort of desperation that must have animated Cæsar when in the act of crossing the Rubicon), when I venture to ask: Why the Law Society does not interfere?

It is either an influential body, or it is not.

It is certainly a body fully competent to judge of the matters in question.

It is continually manufacturing new batches of lawyers.

It is continually, I submit, not protecting them as they should be protected.

It is receiving fees for a protection it does not afford.

I assume that the Law Society is an influential body, and that its representations would have far more weight with the Legislature than other representations could, or ought to, have.

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You suggest that "this is a matter which, in our opinion, should engage the attention of the Attorney-General for Ontario," &c. If you are right, would it not be a proper thing for the Law Society to suggest to the Attorney-General a plan of action, by which the necessary protection might be afforded?

Your obedient servant,

SCRIPTOR SINE SCRIPTUM.

January 16, 1880.

Insolvency.—Reconveyance.

To the Editor of THE LAW JOURNAL.

SIR,—Being Solicitors for Mr. David Falconer, the petitioning creditor, at whose instance proceedings were taken for the removal of the Assignee of the Estate of Howard C. Evans and Company, we have read with a great deal of interest the correspondence in your journal on the judgment delivered by the County Court Judge at Halifax, Judge Johnston, in the matter.

The question at issue being one of practical importance must plead our excuse for troubling you with the present communication.

The Judge held that the Assignee was not justified in reconveying the estate to the Insolvents until the deed of composition and discharge had been confirmed by the Court. A good deal depends, we think, on the meaning that is given to the words "executed as aforesaid." Are the words to be limited to the mere signing of the deed by the requisite number or to the approval by the creditors of the deed as in section 51, or can these words be legitimately construed so as to embrace within their meaning, in addition to the other two, the confirmation of the deed by the Judge, or in other words can a deed be said to be "executed as aforesaid" while anything remains to be done to give it validity? It will, we think, be conceded that the sections of the Act from 49 to 63 both inclusive apply to a discharge or to a composition and discharge given by creditors. Section 49 speaks of the deed being "signed" by a majority; section 51 provides for the consideration of the deed and of the creditors' approval or dissent therefrom. Thus far the word "ex-

ecuted" has not been used in reference to the deed; section 53 says: "an Insolvent who has procured the execution of a deed of composition and discharge," may petition the judge for a confirmation of the discharge effected thereby." We have then to inquire what is the duty of the Judge on the presentation of the petition. Is he as a matter of course to confirm the deed? No, the Insolvent is not entitled to the confirmation of his deed if it appears that he has been guilty of fraud or evil practice in procuring the execution of his deed. The power thus vested in the Judge is, to our minds, Mr. Editor, strongly corroborative of the position that a Judge has something to say as regards the execution. Suppose then the Judge is asked to confirm a deed apparently signed by the requisite number and majority, and on investigation he finds that the majority of the creditors who have signed have not proved, or that they did not represent the requisite amount. He is then bound to stay his hand and say "this deed is not executed; it is worthless," or if it is proved to his satisfaction that the Insolvent procured the signatures to his deed by means of the grossest fraud and by resorting to evil practice, the Judge is bound to say "I will not confirm this deed, it is not executed according to the statute and therefore is not executed at all." The Insolvent, however, immediately on procuring the signatures of the creditors demands from the Assignee a reconveyance of the estate. The Assignee possesses no judicial powers; the law vests in him no authority to enquire into the means used to obtain the signatures, and on the assumption that the words "executed as aforesaid" refer to the signing alone, he has no alternative but to hand over the estate. But it is contended by one of your many correspondents, for which he claims the sanction of judicial authority, that "executed as aforesaid" implies more than the mere signing, that it includes, the approval by the meeting of creditors. By what course of reasoning we ask is the conclusion arrived at that these words include the approval of the creditors but not the confirmation by the Judge especially when the sections referring to the approval and the confirmation both precede section

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60, which contains the clause "executed as aforesaid."

But for the sake of argument admit that the words "executed as aforesaid" embrace within their meaning approval by the creditors, the mischief is not removed. In the case supposed, where the majority is obtained by the signatures of creditors who have not proved and others who have obtained a preference, the Assignee has no power to interfere, or strike off any signature, his duties being merely ministerial, to convene the meeting and record the proceedings and the vote. Is there no remedy, and is the Judge a mere cypher?

By section 52, after the assent of the creditors to the deed has been obtained, the Assignee is to annex to the deed a certificate of the number and who have given their assent to it and to transmit such certificate without delay to the Clerk of the Court—for what purpose? To enable the Insolvent to procure his discharge? Not alone, for his application for confirmation of discharge is optional and not compulsory. And by section 52 the Insolvent is the party to file the deed and certificate previous to giving notice and presenting his petition. Why then is the Assignee required to transmit *without delay* his certificate to the Clerk? With all deference we reply to enable the Judge to ascertain whether the deed is properly executed, and whether as a consequence the Insolvent is entitled to a reconveyance. If the Insolvent wishes to obtain his estate he must apply to have the deed confirmed, and by the Judge confirming the deed it is authoritatively determined that it is "executed as aforesaid." This argument obtains force from a reference to section 60, where it is declared that the reconveyance is only effectual when made in conformity with the terms of a *valid* deed. What if the Judge should determine the deed not to be valid? Then the Insolvent has no right to the reconveyance and the estate ought to be returned to the Assignee. But the Act makes no provision for the Assignee resuming possession except in case of the nonfulfilment of the *terms* of the deed.

Further section 60 assumes that the deed

may be contested and provides for the suspension of any payment or instalment during such contestation, but makes no provision for the Assignee resuming possession should the contestation succeed.

From all this we arrive at the conclusion that the words "executed as aforesaid" intend that three things should concur.

1st. That the requisite number give their assent by signing the deed.

2nd. That the creditors approve of the same at a meeting called for the purpose.

3rd. That the deed be confirmed by the Judge.

By accepting this construction no hardship will accrue to the Insolvent as during the delay necessary to procure a confirmation of the deed he can work the estate through the Assignee and inspectors, and in the event of the deed not being confirmed should he become repossessed of his estate which the law intended should be held in trust for the creditors he might dissipate or transfer the assets so as to have nothing available for them. Thanking you for so much space we are,

Yours, &c.,

MOLTON, MCSWEENEY & FIELDING.
Halifax, Jan. 6th, 1880.

To the Editor of THE LAW JOURNAL.

SIR,—Much difference of opinion has arisen as to the time when a creditors' assignee is justified in reconveying the estate of an Insolvent to him or his appointee, as is directed by section 60 of the Insolvent Act. As yet there is but one judicial opinion upon this question, that I am aware of in this Province, which is to the effect that such reconveyance cannot properly be made until the discharge is confirmed. As I, in my capacity of creditors' assignee, have never refused to reconvey the estate after the deed was filed in the office of the Court, I propose to give my reasons for the course which I have adopted while I disregarded the decision above referred to.

The authority for reconveying is found in section 60, in these words:—"So soon as a deed of composition and discharge shall have been executed as aforesaid, it shall be

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the duty of the assignee to reconvey the estate, &c., &c." The principal question then, if not the only one, is—when is the deed *executed as aforesaid*? The word "execute" has a meaning in law which, it appears to me, settles the matter. Worcester, following Burrill, says, "a deed is *executed* when it is signed, sealed and *delivered*." The signing and sealing are of course contemporaneous and previous to the delivery. In this respect a deed of composition and discharge does not differ from any other deed. Assuming then that the deed is properly and sufficiently signed and sealed, when is it delivered? or in other words, when is the execution completed? Bouvier, I think it is, says, "In law, a paper is said to be *filed* when it is *delivered* to the proper officer, and received by him to be kept on file." It is perfectly clear that there is no delivery previous to this filing, for by reference to the first lines of section 53, it appears that the deed is to be filed in the office of the Court by the Insolvent, showing that he, at this point, is in possession of it. It is also perfectly clear that there is no delivery after this filing, for it is received by him (the officer of the Court) to be *kept* on file. It remains on file forever, and, consequently it can never be delivered any more, or any further, unless the Court is delivered with it.

Again—the deed is to be executed as *aforesaid*—the word "aforesaid" has, in this connection, a significance sufficient in itself to remove every doubt as to the meaning of the word "executed." Mark you, the words "executed as aforesaid," occur in section 60—sections 54 to 59 inclusive refer to the confirmation of the discharge and there is not one word in the whole Act referring to such confirmation until you reach section 53, which directs the notice to be given of the intention to apply to the Court-Form J, which is a part of and embodied in section 53, reads as follows:—"The undersigned (that is to say, the Insolvent) has filed in the office of this Court, a deed of composition and discharge, *executed* by his creditors." The Insolvent is directed to say that the deed is *executed* as soon as it is filed, as provided by, and mentioned in, section 53,

and there is not another word about it being executed; in fact, the word "executed" does not again occur until you find it in section 60, where the deed is now spoken of as "executed as aforesaid."

It seems to me, therefore, that I am obliged to draw the following conclusion from the premises which I have laid down.

The assignee shall reconvey, so soon as the deed is *executed* as aforesaid, that is to say, so soon as the deed is *signed, sealed and delivered* as aforesaid.

The deed is *signed, sealed and delivered* as aforesaid, when it is *signed, sealed and filed in the office of the Court*, as provided by section 53.

Therefore (taking the words of the Act in full) it shall be the duty of the assignee to reconvey the estate so soon as the deed shall have been *signed, sealed and filed in the office of the Court*, that is to say, so soon as the first five lines of section 53 shall have been complied with.

I am obliged to add another observation, owing to the fact that the purport of the last two lines of section 66 have been sadly misrepresented. In order to avoid this misrepresentation it is only necessary to distinguish between the words "deed" and "discharge." The deed hereinbefore referred to has two provisions—The composition part of the deed is the promise by the Insolvent to pay his creditors a certain proportion of his debts. The discharge part is the agreement by the creditors to release the Insolvent. The two parts taken together, namely: the composition and the discharge, with possibly other obligations, comprise what is termed the *deed*. If you will carefully peruse the first dozen lines of section 59, you cannot fail to observe the distinction between the words "deed" and "composition" and "discharge," and will have no difficulty in agreeing with me that while a *discharge* may have no effect as provided in section 66, the *deed* in every other respect, and in all its other functions and requirements, may be and remain in full force.

If section 66 had said that a *deed* should have no effect until it was confirmed, I would be obliged to admit that sections 60 and 66 were contradictory, but as section 60

CORRESPONDENCE—LAW STUDENTS' DEPARTMENT.

refers to the *deed*, while section 66 refers to the *discharge* there is no contradiction, and I have no difficulty in coming to the conclusion that the deed is "executed as aforesaid" when it is filed, as provided by section 53, and that the *deed* being so filed, is of effect in so far as is requisite to justify the assignee in reconveying the estate, notwithstanding the *discharge* "proposed" in and by said deed, may be or become of no effect for want of confirmation.

Yours, &c.,

H. H. B.

Halifax, Jan. 19, 1880.

LAW STUDENTS' DEPARTMENT.

LAW SOCIETY EXAMINATION PAPERS.

FIRST INTERMEDIATE.

Smith's Manual of Common Law and Statutes.

1. State generally the facts necessary for a plaintiff to be able to prove in order that he may be entitled to recover damages for a malicious prosecution.

2. Define and distinguish between (a) a promise and (b) a contract.

3. What difference is there as to powers and means of rescinding (a) a gratuitous promise, (b) a parol contract based on good consideration, and (c) a contract under seal?

4. What are the rights of the landlord and tenant respectively to buildings put on the landlord's property by and at the expense of the tenant, with the landlord's consent in writing?

5. A goes into B's shop and says to B, "Let C have certain articles and charge me with them," and B thereupon furnishes C with the articles in question. On these facts, can B sue A for the price of the goods, and why?

6. Give the effect of Statutory enactments in regard to sending notices of protest of bills of exchange and promissory notes.

7. What is required in order to make binding a promise made after full age to pay a debt contracted in infancy? Answer fully.

SECOND INTERMEDIATE.

Broom's Common Law and Statutes.

1. Give a short sketch of the elements of which our "Common Law" is composed.

2. Can an action be maintained here upon a verbal contract made in France and not to be performed within a year, such contract being enforceable in France? Give the reason for your answer.

3. In how far can a private person on his own authority abate a public nuisance?

4. A, a lunatic, commits an assault on B. In how far is A answerable civilly and criminally?

What rights have riparian proprietors to running streams flowing past their lands?

6. A tenant in tail who is *sui juris* is entitled to bring an action to recover possession of certain lands and fails to do so within ten years from the time such right of action accrued. What effect will this have on (a) his own right of action, and (b) the right of his son who would be entitled as tenant in tail on the death of his father? Give reasons for answer.

7. From what time will the Statute of Limitations run against a plaintiff who has been deprived of his land by means of a concealed fraud?

FIRST YEAR SCHOLARSHIP.

Haynes' Outlines of Equity.

1. In what classes of cases will the Court of Equity grant relief on the ground of accident?

2. Describe the proceedings in an action of ejectment under the former practice. Show how it was that several successive actions might be brought in respect of the same land.

3. Describe the position and power of a married woman with reference to her separate estate acquired under a settlement which imposes restraint upon anticipation, during coverture, during widowhood, and after a second marriage.

4. Under what circumstances will the Court entertain a bill for the perpetuation of testimony.

5. State shortly the proceedings in an administration suit. What classes of persons are usually plaintiffs in such a suit?

LAW STUDENTS' DEPARTMENT—MARITIME COURT RULES.

SECOND YEAR SCHOLARSHIPS.

Williams' Real Property—The Registry Acts.

1. What was the nature of a conditional fee? What power of alienation had the owner of such a fee?

2. What is the meaning of an "estate in fee tail?" What is its origin, and what effect had Saltarum's case upon it?

3. What is a base fee? How can it be converted into a fee simple? What effect will a devise of it as if an estate in fee simple have?

4. State shortly the effect of the statute *Quia emptores*.

5. What was the intention, and what the effect of the Statute of Uses?

MARITIME COURT.

RULES.

The following Rules have recently been promulgated for the Maritime Court of Ontario:—

In pursuance of "The Maritime Jurisdiction Act, 1877," and with the approval of the Governor in Council, I, Kenneth Mackenzie, Judge of the Maritime Court of Ontario, do make the following additional General Rules:

274. No order for advertising a notice of the cause and intended sale in a cause *in rem*, by default, shall be made unless upon the application for such order it is made to appear to the satisfaction of the Judge or Surrogate Judge as the case may be,—

(a) That no owner or mortgagee of the property proceeded against resides in Canada,—or

(b) That the whereabouts of none of the owners or mortgagees in Canada can be ascertained after reasonable efforts in that behalf,—or

(c) That the institution of the cause has come to the knowledge of the owners, or some of them, if in Canada,—or to the knowledge of the agent in Canada of the owners, or some of them—and that the

institution of the cause has come to the knowledge of at least one of the mortgagees under each mortgage upon the property registered in Canada, or to the knowledge of his agent, if any, in Canada.

275. No order for the sale of the property proceeded against in a cause *in rem*, whether by default or otherwise, shall be made; unless upon the application for such order it is made to appear to the satisfaction of the Judge or Surrogate Judge, as the case may be,—

(a) That the institution of the cause has come to the knowledge of at least one of the mortgagees under each mortgage upon the property registered in Canada, or to the knowledge of his agent, if any, in Canada,—or

(b) That the whereabouts of none of the mortgagees in Canada can be ascertained after reasonable efforts in that behalf.

276. Two or more persons having claims against the same property for wages or for necessities may join against the same property in one petition, and unless the sum or sums adjudged to the claimant or claimants in a petition in a cause of wages or of necessities amount to the sum of one hundred dollars at least, no costs shall be allowed to the claimant or claimants, as the case may be, unless under all the circumstances the Judge or Surrogate Judge thinks proper to allow a sum in gross not exceeding ten dollars in lieu of all costs.

This rule does not authorize the joining in one petition a claim for wages and a claim for necessities.

277. No warrant to arrest a vessel shall be issued in a cause of necessities or of repairing unless the national character of the vessel proceeded against shall be stated in the affidavit, and that it shall also be stated in the affidavit that no owner or part owner is domiciled within the Province of Ontario at the time of the necessities being supplied, or at the time of the repairs being made.

Dated November, A.D. 1879.

(Signed) KENNETH MACKENZIE.

LAW SOCIETY, MICHAELMAS TERM.



Law Society of Upper Canada.

OSGOODE HALL,

MICHAELMAS TERM, 43RD VICTORIÆ

During this Term, the following gentlemen were called to the Bar, the names are placed in the order in which they entered the Society, and not in the order of merit :—

JAMES CULLEN LILLIE.
WILLIAM JOHN FRANKS.
JAMES WILLIAM HOLMES.
JOHN SANDFIELD MACDONALD.
GERARD HOLMES HOPKINS.
WILLIAM JOSEPH DELANEY.]
WILLIAM MCKAY READE.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks :—

Graduates.

PETER SINCLAIR CAMPBELL.
ALEXANDER EDWARD WARD PETERSON.
JAMES ANDREW THOMAS.
EDWARD ROBERT CAMERON.
GEORGE BENJAMIN DOUGLAS.
JOHN JOSEPH O'MEARA.
JOHN WILSON ELLIOTT.
WILLIAM H. BARRY.

Matriculants.

JAMES GRACE.
WILLIAM AITCHISON PROUDFOOT.
WILLIAM T. ALLAN.
HENRY THOMPSON BROCK.
ALBERT CARSWELL.
ALBERT EPHRAIM GRIER.
ADOLPH AUGUST KRAFT.
WILLIAM EDWARD MIDDLETON.
CHARLES POTTER.
JOHN CLINIE DREWRY.
FRANK HEDLEY PHIPPEN.
GRANVILLE C. CUNNINGHAM.
CHARLES A. GRIER.
JOHN WILFAD.
JOHN A. RICHARDSON.
FLAVIUS L. BROOKE.
MARCUS W. RUSS.
WILLIAM D. INNES.

Junior Class.

JOHN THOMAS SPOURLE.
DYCE W. SAUNDERS.
HENRY JOHN WICKHAM.
GEORGE HALES.
ARTHUR BURWASH.
JOHN ALEXANDER MCINTOSH.

GEORGE CORRY THOMSON.
NORMAN MCMURCHY.
CHECKLEY FRANCIS JOHNSTON.
WILLIAM JAMES CHURCH.
HUME BLAKE ELLIOTT.
SHERIFF HARKIN.
JAMES MILLER.
CHARLES FRANKLIN FAREWELL.
ALEXANDER GEORGE MURRAY.
WILLIAM HIGFIELD ROBINSON.
JOHN MCNAMARA.
FREDERICK THISTLEWAITHE.
CHARLES MORSE.
EDWARD AUGUSTUS WISMER.
JOSEPH ALPHONSE VALIN.
GEORGE WEIR.
WALTER SAMUEL MORPHY.
LOUIS HAYES.
JAMES S. BODDY.

Articled Clerk.

JOHN ARTHUR ALLEIGH.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

Students-at-Law.

CLASSICS.

- 1879 { Xenophon, Anabasis, B. II.
 { Homer, Iliad, B. VI.
 { Cæsar, Bellum Britannicum.
1879 { Cicero, Pro Archia.
 { Virgil, Eclog. I., IV., VI., VII., IX.
 { Ovid, Fasti, B. I., vv. 1-300.
1880 { Xenophon, Anabasis, B. II.
 { Homer, Iliad, B. IV.
 { Cicero, in Catilinam, II., III., and IV.
1880 { Virgil, Eclog. I., IV., VI., VII., IX.
 { Ovid, Fasti, B. I., vv. 1-300.
1881 { Xenophon, Anabasis, B. V.
 { Homer, Iliad, B. IV.
 { Cicero, in Catilinam, II., III., and IV.
1881 { Ovid, Fasti, B. I., vv. 1-300.
 { Virgil, Æneid, B. I., vv. 1-304.

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A Paper on Grammar.

Translation from English into French Prose—

- | | |
|---------------------|--|
| 1878
and
1880 | } Souvestre, Un philosophe sous les toits. |
| 1879
and
1881 | |
| | } Emile de Bonnechose, Lazare Hoche. |
| | |

or GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

- | | |
|---------------------|--|
| 1878
and
1880 | } Schiller, Die Bürgschaft, der Taucher. |
| 1879
and
1881 | |
| | { Der Gang nach dem Eisen-
hammer. |
| | |

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FOR CALL.

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3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

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DIARY FOR MARCH.

1. Mon. . . St. David's Day.
2. Tues. . . Co. Ct. sitt. for York begin. Court of Appeal sitt. begin.
3. Wed. . . Treaty of St. Stephano.
6. Sat. . . Name of York changed to Toronto, 1834.
7. Sun. . . Fourth Sunday in Lent.
14. Sun. . . Fifth Sunday in Lent.
17. Wed. . . St. Patrick's Day.
18. Thur. . . Princess Louise born, 1843.
21. Sun. . . Sixth Sunday in Lent. Palm Sunday.
23. Tues. . . Sir George Arthur, Lieut.-Governor of U. C., 1838.
28. Sun. . . Easter Sunday. Canada ceded to France, 1632.
30. Tues. . . B. N. A. assented to, 1867.
31. Wed. . . Lord Metcalfe, Governor-General, 1843.

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Canada Law Journal.

Toronto, March, 1880.

We advise our correspondent "A. B." who writes on the legal bills before the Local House (see p. 92), to possess his soul in patience. Things *might* be worse, and a free country must suffer some inconvenience for its freedom. One would however have thought that a Commission, composed of the best of our judges, to enquire into the subject, and to report to, and consult with the Attorney General, would have been a safe course. We have not thought it worth while to review the proposed bills, but shall refer to them after they have become law.

The influence of Bret Harte and Mark Twain is beginning to make itself felt on the English Bench, and to modify the judicial utterances of the Lords of Appeal. The other day in *Ralph v. Carrick*, 28 W.R. 71, the Lords Justices were trying to discover the intention of a foolish, thoughtless and inaccurate testator. Among other cases cited was *Sibley v. Perry*, 7 Ves. 522, whereupon Brett, L. J., took occasion to observe, "I should have no objection to be present at the funeral of *Sibley v. Perry* as soon as that can take place."

The Attorney-General has introduced a bill for an Act to abolish priority of, and amongst execution creditors. This was, we presume, suggested by the expected repeal of the Insolvent Act this Session, though its coming into force is not made contingent upon that event. But, as the repeal may be looked upon as a foregone conclusion, it will not probably be necessary to consider wherein the provisions of this bill might clash

EDITORIAL NOTES.

with the Insolvent Act. The Sheriffs, that unfortunate body who have recently been brought unto unenviable notoriety by one of their number, will, doubtless, be consoled by the thought that the whirligig of time is likely to bring them to the top, and smother the Official Assignees in the sea of obloquy, which they have prepared for themselves at the bottom.

For the benefit of the Students' Debating Society, and those wishing to hold Moot-courts, we will insert, from time to time, subjects which are propounded for discussion in the law-students societies in England. At Manchester the debate was on the subject: "A railway passenger gives his port-manteau to a servant of the company, who asks if he will have it with him in the carriage, and on the passenger consenting, places it in the carriage some time before the train starts. The port-manteau is stolen before the passenger enters the carriage. Is the railway company liable for its value?" At the united law students' debate, the subject was the rather advanced one: "That children born out of wedlock should be legitimized by the subsequent marriage of the parents." Another topic discussed was one which fortunately possesses no interest for us in Canada: "Should the right of presentation to Church livings by private persons be abolished?"

As there seems to be a fair prospect of the English Judicature Act becoming engrafted in the legal system of this Province, it may not be amiss to notice the principle of decision which obtains in England where the former practice in law and equity has been diverse. The Lords Justices hold that preference should be given to that practice which

appears to be the most reasonable, and and most in accord with natural justice. Thus in *The Newbiggin Gas Company v. Armstrong*, 28 W. R. 217, the question came up as to who should pay the costs when the action had been brought by the solicitor without any authority from the nominal plaintiff. Jessel, M.R., compared the roundabout practice in Chancery, which left the defendant to get his costs from the plaintiff, and the plaintiff to get them from the solicitor, with the more sensible practice at law, where the course was to serve the defendant with notice of the application and to order the solicitor to pay the costs of both plaintiff and defendant in the first instance. It was then held by all the judges that the latter practice was to be preferred and should henceforth be the practice in such cases, under the Judicature Act. It appears that the Master of the Rolls had come to the same conclusion in *Nurse v. Durnford*, 28 W. R. 145, when sitting as a judge of first instance.

A correspondent gives us another advertisement illustrative of the subject of unlicensed conveyancers and—collection *bureaus*—let us call them (see p. 92). We presume he is aware, though perhaps all our readers are not, that one of the advertisers there referred to, is not only a Division Court Clerk but also a member of the Local Legislature. When this is realized, it will be easier to understand one of the reasons why the extension of the Division Courts is possible. We have so often expressed our opinion on the subject of unlicensed conveyancers, that we may seem to be monotonous; but we give the Benchers fair warning that we shall not cease agitation on this subject until something is done to remedy the present crying evil. We do not expect much from the legal members of

LEGAL LEGISLATION—THE SUPREME COURT.

the Legislature. They appear to be so wrapt up in the daily necessities of their uncertain position as popular representatives as to be incapable of seeing the rights of the class to which they belong; and we would add, so far as the Division Courts extension is concerned, these gentlemen seem quite oblivious to the injurious effects of such legislation as that about to be adopted. It certainly is not very encouraging to those who wish to see the statute book a record of a thoughtful desire to "make haste slowly" to hear, on the one side, a Minister of the Crown say that the only pressure for the extension came from Division Court officers, and, on the other side, to hear the leader of the opposite party, himself a lawyer, declare his desire further to increase the jurisdiction, and apparently to do that which is so expressively crystallised in Western slang, "to go one better."

In Todd's Parliamentary Government of England, the functions of "Her Majesty's Loyal Opposition" are laid down as follows:—

"They are the constitutional critics of all public affairs; and whatever course the Government may pursue they naturally endeavour to find some ground of attack. It is the function of the opposition to state the case against the administration; to say everything which may plausibly be said against every member of the ministry; in short, to constitute a standing censorship of the Government, subjecting all its acts and measure to a close and jealous scrutiny."

It is left to an opposition which styles itself *conservative* (whatever that may mean), to strike out a new line, and out-herod Herod in its destruction of an existing order of things. It is not our province to discuss this subject beyond this limit; but it will scarcely be denied by any one conversant with the subject that one great curse of the country is over-legislation, superinduced by the supposed exigencies of party politics.

There are some who think the best way to improve the Supreme Court would be to improve it off of the face of the earth. We trust some less heroic remedy may be found, though the Court certainly has, both collectively and through some of its members, on several occasions and in various unnecessary ways, endeavoured to commit suicide.

Whilst, however, it has its own sins to answer for, it is not responsible for all the evil things that may have been alleged against it. A case in point is the manifest failure of justice which has occurred in the *cause célèbre* of *Moore v. Connecticut Mutual Life Insurance Company*; a circumstance more to be deplored in that the defendants, who have been, as is generally conceded by the Bar, improperly ordered to pay some twenty-five thousand dollars on a life insurance policy, are an American Company to whom, as strangers, we should have wished to have seen full justice accorded.

The difficulty in this case arose under the wording of the Supreme Court Act and not from any fault of that Court. The jury at the trial were asked a number of questions, which, being answered in favour of the plaintiff, the verdict was entered for her by the Judge. The Court of Queen's Bench set this verdict aside, as being contrary to the weight of evidence, and entered it for the defendants, a course which, as will be seen, eventually shipwrecked the party intended to be benefited. An appeal to the Court of Appeal fell to the ground; the Court being divided.

When the case came before the Supreme Court, it took an unexpected turn, which brought out in strong light the provision of the Supreme Court Act which prevents that Court from ordering a new trial on the weight of evidence. It was held, in the first place,

THE SUPREME COURT—AGREEMENT TO EXECUTE MORTGAGE.

that the Court of Queen's Bench had no power to enter a verdict for the defendants when questions were left to the jury and answered in favour of the plaintiff; though, at the same time, they agreed with that Court that the answers were against the weight of evidence and that the verdict should have been for the defendants. They thought that the proper course for the Court below to have taken was to have granted a new trial on the ground that the answers were against the weight of evidence, instead of ordering, as they did, a verdict to be entered for defendants; but, as the Supreme Court had no power to do this, all they could do was to reverse the judgment of the Court of Queen's Bench, which took the wrong means to arrive at a right end; and thus allow the verdict for plaintiff to stand.

The curious result was therefore arrived at, that the plaintiff succeeded in holding a verdict which both the Court below and the Court above considered contrary to the evidence adduced. It is difficult to conceive anything more absurd. But as we have said the Supreme Court has plenty of sins of its own to answer for without being saddled with this travesty of justice. We would commend the section of the Act in question to the consideration of the lawyers in the House of Commons.

AGREEMENT TO EXECUTE MORTGAGE.

The question of when a contract to execute a mortgage will be specifically enforced by a Court of Equity is one of some consequence, which is not discussed in the pages of Mr. Justice Fry's book. We propose to collect the cases which have been decided in reference thereto.

In *Barr v. Clively*, Taml. 80, specific performance was decreed of an agree-

ment to lend money on a mortgage security; but this was really done by consent. It appears in the report at p. 81 that the defendant by answer submitted to have the agreement carried out, and asked that it should be done. Sir John Leach says in *Walker v. Barnes*, 3 Madd. 249, "if a man agrees to give a real security for a demand he may be obliged specifically to perform his agreement, though he has no real estate at the time, because he may procure it." This language is, however, to be read as applicable and limited to cases where this is one of the terms of a contract which is otherwise of such a nature as to justify the interposition of the Court; where, for instance, the agreement to give a mortgage is a part of the bargain in a contract relating to the purchase of land. *Arnold v. Hull*, 7 Grant, 47.

Taking, however, the case of an intended lender and borrower, the holding of the Court is different. Thus in *Rogers v. Challis*, 27 Beav. 175, there was a proposal to borrow a certain sum of money on certain terms for a certain time on the security of a mortgage to be given. Shortly afterwards the borrower said he did not want the money, as he could get it elsewhere on better terms. A bill being filed to have the transaction carried out by the giving of the mortgage, it was dismissed. The Master of the Rolls said: "It is a simple money demand. The plaintiff says I have sustained pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is matter for the determination of a Court of Law: the question being, first, whether an action of *assumpsit* will lie upon a contract to borrow money, and second, the amount of damage which the plaintiff has sustained." So in the converse case, a mere agreement to lend upon mortgage security is one over which

AGREEMENT TO EXECUTE MORTGAGE.

the Court will not exercise its special jurisdiction. *Sichel v. Mosenthal*, 30 Beav. 371. See *Thorpe v. Horsford*, 20 W. R. 922.

Different considerations arise when a person is indebted to another and agrees to give him a mortgage by way of security. This is, of course, an agreement which is within the Statute of Frauds as pertaining to land, and requires to be in writing. Here the authorities are at variance as to when the Court will enforce it. According to *Dighton v. Withers*, 31 Beav. 433, this agreement forms of itself an equitable mortgage. There a person was indebted to A. and gave him a memorandum in writing promising, whenever required, to execute a legal mortgage of his equity of redemption in certain premises. The Master of the Rolls held it was a perfectly good equitable mortgage, and enforced it. But in *Crofts v. Feuge*, 4 Ir. Ch. 316. Brady, L. C., held that an antecedent debt was not *per se* any consideration in equity for an agreement to give additional security. He says if the creditor wishes to obtain further security by a new agreement there must be further consideration. An agreement to forbear to sue would be sufficient for that purpose. It may be that the report in *Dighton v. Withers* omits to state that forbearance was given, as would probably be the case. See also *Carew v. Arundel*, 5 L. T. N. S. 498; s. c. 8 Jur. N. S. 71. In *Ashton v. Corrigan*, L. R. 13 Eq. 76, it appears from the facts that the defendant had agreed to execute a mortgage to the plaintiff with absolute (*i. e.* an immediate) power of sale in consideration of an antecedent debt. It does not appear what the consideration was. Vice Chancellor Wickens doubted whether a contract by which the mortgagee may enforce the power of sale a day after the execution of the mortgage was one which the Court will specifically en-

force; but he granted the relief sought in that case, because there was no contest, and on the authority of some unreported cases referred to in Seton on Decrees. These cases, taken together, leave the matter still doubtful whether the Court will, in a litigated case, give specific effect to an agreement to execute a mortgage for an antecedent debt, if there is no stipulation that the intended mortgagee shall forbear to sue.

On the other hand, in *Herman v. Hodges*, L. R., 18 Eq. 18 an advance of money had been made upon an agreement to execute a mortgage therefor with an immediate power of sale. The defendant had actually received the money and then refused to give the security. Lord Selborne said he had no doubt in making a decree therefor unless the defendant was prepared to pay off the advance at once. This was, of course, a plain case of fraud on the part of the defendant, and the Court will be astute to hold him to the letter of his engagement, after he has received the consideration agreed upon.

In connection with this subject two other cases may be noted. In the absence of an express contract, the mortgagee has no claim against the intended mortgagor for the costs of investigating the title where the treaty ends, even through the mortgagor's default: *Wilkinson v. Grant*, 18 C. B. 319. When the treaty ends because the mortgagee is dissatisfied with the security after investigation, the mortgagor has no claim for costs attending the investigation, but this is otherwise if the negotiations go off without such reason: *Carter v. Merriam*, 32 L. T. N. S. 663.

UNNECESSARY AND DISCORD- ANT JUDICIAL OPINIONS.

When one considers how cases involving adjudication upon new, and even upon

UNNECESSARY AND DISCORDANT JUDICIAL OPINIONS.

old points, have to run the gauntlet of judicial criticism: how they are considered, observed upon, explained, doubted, not followed, questioned, disapproved of, impeached, and finally over-ruled, and how on the other hand they are commended, affirmed, extended and followed, it is marvellous that judges impose so much extra work on each other by extrajudicial deliverances. They seek not only to dispose of the matters in hand, but also to give their views on other points not necessary for the decision and which are commonly called *obiter dicta*—observations dropped by the way. It is amazing to look over catalogues of impugned decisions and to find how many relate to the *dicta* of discursive judges. No doubt many of these over-ruled *dicta* in the older cases proceed from the inaccuracy of the reporters. As Lord Mansfield remarked in *Saunderson v. Rowles*, 4 Burr. 2068, "It is impossible for any man to take down in a perfect and correct manner every *obiter* saying that may happen to fall from a judge in a long and complicated delivery of his opinion and the reasons of it." But where, as is usually the case in the country, the judge puts his reasons into writing, the blame of inaccuracy cannot be cast upon the reporter. The modern reporter cannot act on the advice given by Lord Coke "in doing wisely by omitting opinions that are delivered accidentally, and which do not conclude to the point in question" (1 Co. R. 50), for he has to print what the judge hands out. Indeed it would never do to vest such a discretion in the modern reporter, as it would in effect make him to sit in judgment on the judge—although this is what Campbell boasted he did with Lord Ellenborough's decisions at *Nisi Prius*.

The observation long ago made by Chief Justice Willes, that great mischief arises from judges giving *obiter* opinions

(Willes, 666), is well founded and could be amply illustrated from Canadian examples, were any good purpose to be served thereby. Litigation is encouraged or suggested by general observations which upon examination it is found cannot be sustained. The proverbial uncertainty of the law is increased by the utterance of judicial doubts and queries and dicta which so far from settling anything contribute to the general unsettlement of what is thus agitated. All these evils exist in a more marked degree where the judges, guilty of the incaution, occupy seats in an Appellate Court and *a fortiori* in an Appellate Court of last resort.

This journal has all along deprecated the practice of each judge in an Appellate Court giving his individual views and reasons for decision upon the matter in controversy. We have before discussed this question at some length, and pointed out the mischief and disadvantages of such a course. By way of example it is only necessary to refer to some of the recent decisions of the Supreme Court of Canada. It is premature to discuss the confusion which has arisen from the decision in the famous "Great Seal" or "Queen's Counsel" case, because the text of the various judgments has not yet been officially promulgated. But one need not go beyond the last number of Duval's reports to be assured of the mischief of delivering and reporting manifold discordant judgments as representing the conclusion of the Supreme Court on cases there appealed. How notably different is their course from that which obtains in the other court of ultimate appeal for the colony (the Privy Council) where one judge alone clearly and fully gives the decision of the Court.

The main difficulty that meets one in considering some of the judgments of the Supreme Court, is upon what grounds

UNNECESSARY AND DISCORDANT JUDICIAL OPINIONS—NOTES OF CASES.

does the judgment of the Court rest—what is and what is not extra-judicial in each particular judgment—and in the united result which forms the decision of the Court? Consider for instance *McLean v. Bradley*, 2 S. C. R., 535. One question raised was, whether a mining company, having failed in its operations, could sell under the provisions of a Nova Scotia statute, and had sold the goods in question to the plaintiff. The present Chief Justice (then Ritchie J.) held in the affirmative, with him agreed Mr. Justice Strong. But Mr. Justice Henry held, that the statute “only applied to a going concern and could not be applied to the expiring flicker of a bankrupt company.” Ritchie J. held, that the sale of the goods did not require to be under the corporate seal. Henry J. held, that such a sale, if valid, must be under the corporate seal. Henry J. further held, that the statute did not apply to the company because it was not incorporated as a trading company. Strong J. held, that “there was no doubt that the company was one to which the statute was applicable.” There is a plain point on which the decision of all the judges (except Ritchie J.) could be based harmoniously and that is that the plaintiff failed because he complained of the sale of the goods by the sheriff as a conversion and that sale was justified by the order of the Court to sell the goods which had already been seized by the sheriff under a writ of attachment.

The judgment as reported emphasizes the want of harmony in the court, and by consequence weakens the authority of its decisions and sows the seeds of future litigation by the diversity of opinions expressed on points which are left undetermined by the Court, though peremptorily and often diversely passed upon by individual judges.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

From Oaler. J.]

PALMER V. SOLMES.

Slander—Incest—Special damage—Pleading.

In a declaration in slander by a married woman, the words charged imputed that she had committed incest and adultery with her father, and alleged, as grounds of special damage (1) the loss of the consortium of her husband, and (2) the loss of the society of friends. *Held*, in demurrer, good, although the second ground was clearly insufficient.

McMichael, Q. C., for plaintiff.

Clute, contra.

SULLIVAN V. CORPORATION OF THE TOWN
OF BARBIE.

Municipal corporations—Defective drainage—Pleading.—R. S. O. c. 174, sec. 491.

To a declaration charging defendants with negligence in the construction of certain drains and sewers, whereby they became choked, and the drainage and sewage matter overflowed into the plaintiff's premises, causing damage, the defendants pleaded that the cause of action did not arise within three months before action: *Held*, on demurrer, plea bad, as sec. 491 of the Municipal Act, R. S. O., c. 174, did not apply to a case of the kind.

Pepler, for plaintiff.

Lount, Q. C., contra.

From Armour J.]

RE HARRIS V. HAMILTON.

Municipal corporations—Market regulations—Power of Provincial legislatures—Definitions of by-law.

A City Council, acting under the authority of R. S. O., cap. 174, sec. 446, passed a by-law prohibiting vendors of “small wares

C. of A.]

NOTES OF CASES.

[C. of A.]

from practising their calling in the James Street Market," or in the public streets adjacent thereto: *Held*, that the Provincial Legislature possesses the power under the British North America Act to pass Acts to regulate markets, and that the above section was not *ultra vires*. *Held* also, that the term "small wares," being used in the Act, it is sufficient to use it in a by-law passed under the Act, although difficulty might arise as to what is included under it. *Held* also, that the prohibition against selling "in the public streets adjacent," was bad for uncertainty.

Robinson, Q. C., for applicant.

McKelcan, Q. C., contra.

From Blake, V.C.]

DILK V. DOUGLAS.

Mortgages—Discharge by surviving Mortgagor.

C. created two mortgages in favour of M. B. and her two sisters to secure repayment of moneys advanced by them. C. then sold portions of the land to D. and E., who had full notice under the Registry Laws that the original mortgages were charges against the property, giving them his covenant against incumbrances. Subsequently, and after the death of the two sisters, C. procured M. B. to execute discharges of these mortgages, giving her a mortgage for \$3,500 on other lands of ample value, by way of security. After the registration of these discharges, he sold the rest of the land comprised in the original mortgages to others. C. afterwards induced M. B. to accept in lieu of the mortgage for the \$3,500 which she discharged, a mortgage upon other lands which were wholly insufficient in amount. Upon the death of M. B. the personal representatives of herself and her sisters filed a bill seeking to charge the land embraced in the original mortgages with the amount remaining due upon these securities.

Held, that the decree of BLAKE, V. C., that the discharges by M. B. were valid and effectual so far as the subsequent purchasers were concerned, as when they received their conveyances and paid the consideration therefor, a discharge by M. B., the person

entitled by law to receive the money, was registered; but that the discharges were inoperative as against C. D. and E. to extinguish the interest of the deceased sisters other than M. B., as the statute refers to payment of the debt in money, and not to the acceptance of another security.

Mowat, Q. C., for appellant.

Bethune and Cox for respondents.

Appeal allowed.

From C. P.]

DONLY V. HOLMWOOD.

Joint Stock Company—Insolvency.

Held, affirming the judgment of the Common Pleas, that the directors of a joint stock company, incorporated under the "Canada Joint Stock Companies' Letters Patent Act, 1869, 32-33 Vict, c. 13, D.," and subject to the provisions of the Insolvent Act of 1875, cannot, without being authorized by the shareholders, make a voluntary assignment in insolvency.

McCarthy, Q. C., for the appellant.

Appeal dismissed.

From Q. B.]

[Jan. 20.]

CROSS V. CURRIE.

Promissory note—Accommodation—Endorser—Insolvent holder.

B. one of the defendants who had endorsed a promissory note, made by C, the other defendant, for his accommodation, endorsed another promissory note made by C. for the purpose of renewing the former note. Instead of retiring this note, C. parted with the renewal to the plaintiff, who was aware at the time that B. had been assisting C. in money matters. After the note had been endorsed by C. to plaintiff, C. procured B.'s endorsement of another note at a shorter date, stating that the holders of the original note would not accept the first renewal, and promising to return the latter with the original note. It was found that there was no bad faith on plaintiff's part in taking the note.

Held, affirming the judgment of the Court

of Queen's Bench, that the plaintiff was entitled to recover against B.

*Bethune, Q.C., and Ewart for appellants,
Miller for the respondent.*

Appeal dismissed.

From Proudfoot, V.C.] [Jan. 26.]

RE ROSS.

Production, Affidavit of.

On appeal from an order of the Master at Barrie demanding the production in his office of the books of creditors, who had produced promissory notes as vouchers for their claim, Proudfoot V. C. held that an undertaking by the creditors to permit inspection by the executors or their agent of their books and accounts at their place of business in Toronto, and to permit the executors to make extracts, was satisfactory, and set aside the direction with costs. *Held*, on appeal from this decision, that the executors were also entitled to an affidavit identifying the books and documents as being all in their possession relating to the claim.

Mulock for the appellant.

McDonald for the respondent.

Appeal allowed.

From C.P.] [Jan. 26.]

FITZGERALD V. GRAND TRUNK RAILWAY.

Agreement—Additional parol term—Railways—Conditions.

The plaintiffs declared upon a contract by the defendants to carry, in covered cars, a quantity of petroleum. The oil was shipped by the plaintiffs from London upon a request note signed by them, and a corresponding receipt granted by the defendants, by which they undertook to carry it to Halifax subject to the terms and conditions endorsed upon it, by which they stipulated, and the plaintiffs agreed that they should not be responsible unless the goods were signed for as received by a duly authorized agent; that they would not be liable for leakage or delays and that oil would under no circumstances be carried except at the owner's risk. The receipt said nothing about covered cars, but a verbal contract

between the plaintiffs' and defendants' agent was proved, whereby the defendants agreed to carry the oil in covered cars. The oil was, however, carried in open cars, and delayed at different places on the journey, in consequence of which a large quantity was lost.

Held, affirming the judgment of the Common Pleas, that even if the verbal contract was admissible the defendants were not liable thereon, as it was one which the evidence shewed the agent had no authority to make; but that the condition providing that the oil should be carried at the owner's risk did not absolve them from negligence in carrying it, which was clearly shewn, although they had power to make such a stipulation, and that the plaintiffs were therefore entitled to recover for the damage sustained, and the declaration was amended accordingly.

Per MOSS, C. J. A., that the verbal evidence was admissible, as the nature of the transaction shewed that the parties did not intend the documents to be the record of the contract.

Per BURTON, J. A., that it was inadmissible, as there was no evidence to show that the parties did not contemplate that the consignment note and the receipt should be the final and complete contract.

McMichael, Q. C., and Bethune, Q. C., for the appellants.

Glass, Q. C., and Fitzgerald for the respondents.

Appeal dismissed.

From C.P.] [Jan. 26.]

RYAN V. RYAN.

Statute of Limitations—Possession as caretaker v. agent—Subsequent entry of owner—Tenancy at will.

Held, reversing the decision of the Common Pleas 29 C. P. 449, PATTERSON, J. A., dissenting, that the evidence shewed that the plaintiff occupied the lands in question as tenant at will, not as caretaker and agent of his father, and that there had been no determination of the tenancy.

Bowlby for the appellant.

McCarthy, Q. C., for respondent.

Appeal allowed.

Q. B.]

NOTES OF CASES.

[Q. B.]

QUEEN'S BENCH.

IN BANCO.

REGINA V. HART.

Private prosecution at suit of Crown—Costs.

There is no power to impose costs in the case of an unsuccessful private prosecution, at the suit of the Crown.

Aylesworth for prosecutor.

McCarthy, Q. C., contra.

LA VASSAIRE V. HERON.

Distress clause in mortgage—Seizure of goods of a stranger on premises—Abandonment of distress.

Under a mortgage in fee, from V. to M., on certain lands, the interest was payable yearly on January 30. The mortgage contained a power to the mortgagee to distrain for arrears of interest in the usual form contained in the short form in R.S.O. c. 104. Two years' arrears of interest had accrued, and were in arrear on 30th January, 1879. On 23rd May, 1879, the defendants under power of attorney from the mortgagee, and as his agents, entered upon the mortgaged lands and seized the goods of the defendant under a distress warrant for the arrears of interest. The plaintiff was tenant of the mortgagor, and entered after the making of the mortgage. Defendants served a notice on the plaintiff that they had distrained; they did not remove the goods, but left them in possession of the plaintiff on the premises. On the 18th August, 1879, defendants served another notice on plaintiff as sub-tenant of the mortgagor, that they had on that day distrained plaintiff's goods for \$8.75 and costs, in addition to the seizure and demand on the 23rd May; the \$8.75 being for half a year's arrears of interest ending 30th July, 1879. At this time defendants again seized and removed the goods, which were afterwards sold under the distress warrant.

Held, that the defendants had abandoned the first seizure, and could not seize a second time for the same demand. *Held* also, that the half-year's interest demanded

by the second seizure was not due by the terms of the mortgage, and that the distress was for that reason illegal.

Quere—Whether the goods of a stranger on the mortgaged premises are liable to distress under a mortgage containing the usual distress clause under the Short Form Act.

McMichael, Q. C., for plaintiff.

Spencer, contra.

IN RE CHAMBERLAIN AND STORMONT, DUNDAS & GLENGARRY.

High School districts—Power of County Councils—Leave to rehear after lapse of time.

Since the repeal of 37 Vict. c. 27, sec. 38, by 40 Vict. c. 16, sec. 18, subs. 2, a County Council has no power to determine the limits of high school districts.

Leave was granted, notwithstanding the lapse of two terms, to rehear a rule made absolute, to set aside a by-law on no cause being shewn, and the Court refused to rescind the rule granting the leave to rehear.

Richards, Q. C., and *Rose*, for applicant.

Bethune, Q. C., contra.

VACATION COURT.

Osler, J.

REGINA V. CUTHBERT.

Transient trader—Summary conviction.

Where goods are consigned to be sold on commission, and they are so sold in the shop or premises of the consignee, and by him or on his behalf, the owner of the goods is not a transient trader (within the Municipal Act, R.S.O. c. 174, sec. 466, sub-s. 53, as amended by 42 Vict. c. 31, s. 22), and a conviction of the manager or owner of the goods sold under such circumstances, partly by the consignee and partly by the manager, for infraction of a by-law passed under the said Act, was therefore quashed.

In this case, also, the conviction was held bad, because it imposed imprisonment with hard labour in default of sufficient distress; sec. 400 of the above Act authorizing imprisonment. *Held*, also, that there

Q. B.]

NOTES OF CASES.

[C. P.]

being this special provision in the Municipal Act, the procedure under the Dominion Act relating to summary convictions could not be adopted under that Act. *Quære*, whether if the Dominion Act were applicable, the Provincial Legislature would have power to authorize imprisonment with hard labour?

Held, also, that the validity of the by-law might be questioned on a motion to quash the conviction made under it.

Ferguson, Q.C., for plaintiff.

McMichael, Q.C., *contra*.

COMMON PLEAS.

January 13.

CRUICKSHANK V. CORBY.

Arbitration—Parol submission—Reception of evidence in absence of party—Setting aside award.

Where there is a written submission of existing differences to the award of an arbitrator to be appointed by a person named in the submission, and in pursuance thereof such person verbally appoints the arbitrator who enters upon the reference and makes his award,

Held, that the submission cannot be deemed to be a parol submission merely because the arbitrator is appointed verbally, and that therefore the submission could probably be made a rule of court.

The arbitrator herein received evidence in the absence of one of the parties: *Held* that the award must be set aside with costs.

Bruce (of Hamilton) for the plaintiff.

E. Martin, Q.C., for the defendant.

February 6.

PALMER V. SOLMES.

Slander—Incest—Whether criminal offence—Special damage.

In an action for oral slander the words spoken consisted in charging the plaintiff with having had incestuous intercourse with his daughter.

Held, that the offence charged did not constitute a crime cognizable in our courts,

so as to be actionable without proof of special damage.

The special damage alleged was that the plaintiff had been shunned and avoided by divers persons, and had lost the society of friends and neighbours who refused to and did not associate with him as they otherwise would have done, whereby illness of body and great pain of mind and injury to his feelings had been caused, and that he had been put to and incurred great loss and expense in procuring and paying for medicines and medical attendance in and about curing himself of the said illness.

Held insufficient.

McMichael, Q.C., for plaintiff.

Clute (Belleville), for defendant.

CANADA REPORTS.

ONTARIO.

COUNTY COURT OF THE COUNTY OF MIDDLESEX.

MCINTYRE V. MCCORMICK.

Practice—Non-compliance with order to examine.

Held,—Defendant not bound to attend to be examined during sitting of Court at which cause entered for trial.

[London, Jan. 20, 1880.]

Action for deceit; plea not guilty; issue joined; order to examine defendant, and appointment for 1st December (the first day of sittings of Court) duly served. The defendant refused to attend, although present at sitting of Court on that day. The record was entered, and the cause came on for trial on the fifth day, when the plaintiff's counsel, upon proof of above and other material facts, moved for an order to strike out the defence, on the ground that defendant had failed, without sufficient excuse, to comply with the order. This motion was refused, and counsel for defendant pressed on the case, but the plaintiff's counsel declined to proceed until after examining defendant. The learned judge directed the jury to find a verdict for defendant.

In January Term, 1880, *Bartram* obtain-

Co. Ct.]

McINTYRE v. McCORMICK—EVANS v. VOLNEY.

[Co. Ct.]

ed a rule nisi to set aside verdict for defendant and strike out his defence, or for a new trial, with costs to plaintiff.

R. M. Meredith shewed cause, opposing the rule upon a number of grounds, not now material, and upon the ground that defendant had a sufficient excuse in attending Court, upon advice of his attorney.

Bartram supported his rule. *Senn v. Hewitt*, 8 P. R. 70, shows that an examination during sitting of Court is unobjectionable. The statute does not limit the right of one party to examine the other during the sitting. The defendant was guilty of contempt of Court. There must be a new trial, and defendant should pay costs, otherwise plaintiff would be punished for the crafty trick of defendant in not submitting to be examined for fear of benefitting the plaintiff's case.

ELLIOT, Co. J.—In this case an order was made by my brother judge, on the 27th of November, at the instance of the plaintiff, for the examination of the defendant before Mr. Horton, who appointed the 1st of December following for that purpose. The County Court sittings commenced on that day. At the trial, the counsel for the plaintiff offered no evidence, but asked to have the defence struck out, because the defendant had not appeared before Mr. Horton for examination, pursuant to the order and appointment. This application was made under 41st Vict. c. 8, s. 9, by which it is enacted, "If any person fails, without sufficient excuse, to comply with an order for examination, . . . he shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and if a defendant to have his defence struck out and to be placed in the same position as if he had not defended, and the Court or a Judge may make an order accordingly." I declined to accede to this application, and the plaintiff's counsel having declined to accept a non-suit, I directed the jury to find a verdict for the defendant, which they did.

It is true that by the 156th section of the Common Law Procedure Act it is enacted that either the plaintiff or defendant may at any time after the cause is at issue obtain an order for the examination of the

opposite party; but I think these words ought to be interpreted in a reasonable sense; and I think it would be unreasonable that the defendant, having received notice of trial from the plaintiff for the 1st December, at the Court House in London, should also be required by another notice from the plaintiff to appear elsewhere, on the same day, to be examined. The defendant, certainly, could not be at two places at once, and his paramount duty was to be in attendance for his trial. I think much inconvenience would result from the allowance of such a practice. There was ample time in this case for an examination after issue was joined, and before the trial. I don't therefore see any reason for changing the opinion I formed at the trial. But it is not desirable that the plaintiff should be debarred from having his case, tried in consequence of what may have been a mistake. In this view the plaintiff may have a new trial on payment of costs.

REFERENCE FROM THE COMMON PLEAS.

EVANS v. VOLNEY.

Reference from Nisi Prius—Notes not properly stamped—Right of referee to allow payment of double duty—Time when application must be made and leave granted.

This case was referred, at the Brockville Spring Assizes of 1879, to H. S. McDonald (County Judge of Leeds and Grenville).

At the hearing in October it appeared from the evidence of a witness or witnesses that the notes sued on (19 in number), or a number of them, had not been properly stamped, or that the stamps had not been properly cancelled.

Reynolds, for the plaintiff, applied to re-stamp the notes, or to stamp them in such a manner as would make them valid. The referee allowed the application to stand.

On a subsequent day, Mr. Reynolds renewed his application, under 42 Vict. (Dom.) cap. 17, sec. 13. He cited *La Banque Nationale v. Sparks*, 2 App. Rep. 112.

EVANS V. VOLNEY—DIGEST OF ENGLISH LAW REPORTS.

Fraser, Q.C., contra, contended that the Referee was acting under an Ontario Act, which could not give him any jurisdiction under a Dominion Act. That even if the words of the Dominion Act were wide enough to enable a Referee to make such an order, the order of reference in this case was too limited to enable the power to be exercised. That, even by consent of both parties, the Referee could not and would not have authority. That the order must be made or permission given by "Court or a Judge," and that a Referee is not either the one or the other. That the Court or Judge could not delegate the power, and it has not been done.

Further, that the stamps should have been affixed on the day when the error was discovered,—nearly a week previously.

That the only issue on the record was, that the notes are not properly stamped, and that if plaintiff were now allowed to double stamp, a new issue would be raised as to whether the double stamps were affixed at the proper time.

He cited *Le Banque Nationale v. Sparks*, 2 App. Rep. 112; *Waterous v. Montgomery*, 36 U. C. R. 1; *Boyd v. Muir*, 26 C. P. 21; *House v. House*, 24 C. P. 526; *3rd National Bank v. Cosby*, 43 U. C. R. 58; *Boustead v. Jeffs*, 44 U. C. R. 255.

McDONALD, Co. J., the Referee, reserved his decision, and on the following day gave judgment, holding that he had power to permit the double duty to be paid, and allowed it to be done. As to the lapse of time, he held that, as the plaintiff's counsel had applied for permission when the evidence showed the necessity, and he (the Referee) had allowed the application to stand, the plaintiff was not in fault.

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH, AND APRIL, 1879.

ACCOUNT CURRENT.—See MORTGAGE, 2, 4; SURETY.

ACTION.

A claim for goods lost by a common carrier, alleging a contract to carry the goods safely

for hire, and a breach, was held to be an action "founded on contract," not on tort.—*Fleming v. The Manchester, Sheffield, & Lancashire Railway Co.*, 4 Q. B. D. 81.

See JUDGMENT.

ADJACENT SUPPORT.—See EASEMENT.

ADMINISTRATION.—See WILL, 4.

ADVANCES.—See MORTGAGE, 4.

AGENT.—See DIRECTOR.

APPROPRIATION.—See SURETY.

ARBITRATION.—See PARTNERSHIP, 2.

ATTORNEY AND CLIENT.—See LIEN, 2.

ATTORNMENT.—See MORTGAGE, 2.

BANK.—See MORTGAGE, 2, 4; SURETY.

BILL OF SALE.—See MISDESCRIPTION; SALE, 3, 4.

BROKER.—See LIEN, 1.

CAVEAT EMPTOR.—See SALE, 1.

CHARTER-PARTY.—See INSURANCE.

CHILDREN.—See WILL, 1.

CLASS.—See WILL, 2.

CONDITION.—See LIMITATIONS STATUTE OF.

CONSTRUCTION.—See INSURANCE; MORTGAGE, 3; RIGHT OF WAY; WILL, 5, 6.

CONTRACT.—See ACTION; CORPORATION.

CONVERSION.

G. bequeathed personal estate, in trust, to be converted by the trustees into real estate. They converted portions of it, and subsequently all the limitations of the trust failed. Held, that the portions turned into real estate before that failure, went direct to the next of kin, as real estate, not to the executor for distribution as personal estate. The heirs-at-law or devisees of deceased next of kin, not their personal representatives, took. *Reynolds v. Godlee*, (Joh. 536, 582), overruled.—*Curtis v. Wormald*, 10 Ch. D. 172.

See SALE, 2.

COPYRIGHT.

Two books entirely different in contents and character, were published, each under the title, "Trial and Triumph." Held, that a copyright in the title might be claimed, though the books were quite different.—*Weldon v. Dicks*, 10 Ch. D. 247.]

CORPORATION.

By act of Parliament, it was provided that every contract involving above £50, made by a public corporation like the defendant, should "be in writing and sealed with the common seal." The jury found that the defendant corporation verbally authorized its agent to order plans for offices of the plaintiff; that the plans were made, submitted, and approved; that the offices were necessary, and the plans

DIGEST OF ENGLISH LAW REPORTS.

essential to their erection; but the offices were not built. *Held*, that the plaintiff could not recover.—*Hunt v. The Wimbledon Local Board*, 4 C. P. D. 48; s. c. 3 C. P. D. 208.

COVENANT.—See MORTGAGE, 3.

CUSTODY OF CHILDREN.—See HUSBAND AND WIFE.

DAMNUM ABSQUE INJURIA.—See INJUNCTION.

DEMURRER.—See INJUNCTION; TRUST, 1.

DEVISE.—See WILL, 3.

DIRECTOR.

Where a fraudulent and misleading prospectus is issued by the agent of a company, or by directors, a director who did not authorize the fraud, or tacitly acquiesce in it, is not liable therefor. Per *FRY, J.*, commenting on *Peck v. Gurney* (L. R. 6 H. L. 377), and *Weir v. Barnett* (3 Ex. D. 32).—*Cargill v. Bower*, 10 Ch. D. 502.

See COMPANY.

DISCRETION.—See TRUST, 2.

DISTRESS.—See MORTGAGE, 2.

DIVORCE.—See JURISDICTION.

DOMESTIC RELATION.—See HUSBAND AND WIFE; JURISDICTION.

DOMICILE.—See JURISDICTION.

DOUBLE LEGACY.—See LEGACY.

EASEMENT.

Two houses, belonging respectively to plaintiff and defendant, had stood adjoining each other, but without a party wall, for a hundred years. In 1849, the plaintiff turned his house into a coach factory, by taking out the inside and erecting a brick smoke-stack on the line of his land next the defendant's, and into which he caused to be inserted iron girders for the support of the upper stories of the factory. The lateral pressure on the soil under defendant's house was thus much increased. The owner did not object to the girders, but it did not appear that he understood the full character of the changes made in 1849. He had since then made no grant by deed of the right to support. More than 20 years after that date, the defendant contracted with one D. to take the house down and excavate the soil for a new building. D. employed N. to do the excavating. N. did it without negligence, but nevertheless, from the withdrawal of the support, the smoke-stack toppled over, dragging the factory along with it. *Held*, that the enjoyment of the support for twenty years raised a presumption that the plaintiff had it of right, but that the defendant was at liberty to rebut the presumption, either by showing (1) That the defendant did not know the character of the alterations made when the house was turned into a factory; or (2) that he had no capacity to make a grant. The defendant might be liable, though the work was actually done by a contractor empowered by him, and although he had given the contractor proper

caution as to the dangerous character of the work.—*Angus v. Dalton*, 4 Q. B. D. 162; s. c. 3 Q. B. D. 85.

See WATERCOURSE.

EQUITABLE MORTGAGE.—See MORTGAGE, 4.

ESTATE TAIL.—See TRUST, 1.

EVIDENCE.

The plaintiff, a clergyman, saw an advertisement, signed by H., an agent of the defendants, to loan money on personal security, and, applying for a loan, was told that he must insure his life in the defendant company, pay the premium, and deposit the policy with H. as collateral, whereupon the loan would be made. The plaintiff did so, whereupon H. wrote, enclosing a parcel of "draft securities" for the plaintiff to have executed, of a sort which it was quite impossible for him to furnish. It was claimed that the transaction was a fraud perpetrated by the company through H. as its agent, and that the premium was divided between H. and the company, and that no loan was intended. Evidence of other specific transactions of the same or a similar sort was admitted at the trial, and a new trial was granted on the ground that such evidence was inadmissible. *Held*, that the evidence was admissible.—*Blake v. The Albion Life Insurance Society*, 4 C. P. D. 94.

See LIBEL; MISDESCRIPTION; WILL, 1.

EXECUTOR.—See WILL, 4.

EXTRADITION.

The English Extradition Act, 1870, includes "crimes by bankrupts against bankruptcy law." The treaty with Switzerland includes "crimes against bankruptcy law." One T. was arrested in England, on a warrant, stating that he was accused of "the commission of crimes against bankruptcy law" in Switzerland. The English Extradition Act, 1870, provides that a magistrate, on receiving an order from the Secretary of State, shall issue a warrant for the arrest of a fugitive "on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed . . . in England." *Held*, that the warrant was sufficient.—*Ex parte Terraz*, 4 Ex. D. 63.

EXTRINSIC EVIDENCE.—See WILL, 1.

FALSE PRETENCES.—See SALE, 2.

FIRM NAME.—See PARTNERSHIP, 1.

FLOW OF WATER.—See WATERCOURSE.

FOREIGNER.—See JURISDICTION.

FORFEITURE.—See WILL, 7.

FRAUD.—See DIRECTOR; EVIDENCE; JUDGMENT; SALE, 2.

FRAUD, STATUTE OF.—See TRUST, 1; WILL, 3.

FREIGHT.—See INSURANCE.

GRANT.—See EASEMENT.

GUARANTY.—See SURETY.

HIGHWAY.—See RIGHT OF WAY.

DIGEST OF ENGLISH LAW REPORTS.

HUSBAND AND WIFE.

In 1864, A., a Protestant, married a Roman Catholic, promising that the children should be brought up as Roman Catholics. A son, born in 1864, was baptized by a Catholic priest, with the father's reluctant consent, and died in 1872. Of three daughters, born respectively in 1866, 1867, and 1869, the first and third were secretly baptized as Roman Catholics, without the knowledge and against the commands of the father. The second was baptized as Protestant. Subsequently, the father had the three children, baptized as Roman Catholics, formally received into the Protestant church, against the mother's protest. The mother secretly brought them up in the Roman Catholic tenets, and had them go to confession once a month from their attaining eight years of age. She had them confirmed by a bishop. In 1878, instigated by their mother, they refused to go to the Protestant church with their father. On actions brought both by the husband and by the wife for directions as to the bringing up of the children, *held*, that the husband had complete authority to have them brought up in any proper manner, as he saw fit, notwithstanding his promise, and that the wife be enjoined from doing anything inconsistent therewith. The court refused to examine the children.—*In re Agar-Ellis*; *Agar-Ellis v. Lascelles*, 10 Ch. D. 49.

See JURISDICTION.

ILLEGITIMATE CHILDREN.—See WILL, 1.

INFANT.—See HUSBAND AND WIFE.

INJUNCTION.

The plaintiffs alleged that their house had been called "Ashford Lodge" for upwards of half a century, and that a house adjoining had been during nearly all that time called and known as "Ashford Villa," and that the defendant had recently bought the latter house, and had proceeded to call it "Ashford Lodge," to the material damage of the plaintiffs and the confusion of their friends. No malice was alleged. The house was the respective private residences of the plaintiffs and of the defendant. To the first belonged sixteen acres of land; to the second, nine. *Held*, that there was no ground for an injunction, and a demurrer was allowed.—*Day v. Brotenrigg*, 10 Ch. D. 294.

See MORTGAGE, 1.

INSURANCE.

A charter-party entered into by the plaintiffs contained this clause: "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate." The plaintiffs, who owned the ship, got a policy of insurance with this clause: "To cover only the one-third loss of freight in consequence of sea-damage as per charter-party." A portion of the cargo was sea-damaged, and the plaintiffs lost one-third the freight on that portion. The total freight on the cargo was £3,871; one-third of that amounted to £1,290, and the amount of insurance on that portion was £1,200. The one-

third freight lost equalled £293; hence, the plaintiffs claim £273 insurance; i. e. the proportion of loss which the amount insured bore to the value of one-third of the freight. The underwriters contended that the amount due was to be fixed by the proportion of the sum insured to the whole of the freight. *Held*, that the plaintiffs were entitled to their claim.—*Griffiths v. Bramley-Moore*, 4 Q. B. D. 70.

See EVIDENCE; LIEN, 1.

JUDGMENT.

There was a controversy over an alleged infringement of a patent, and it was agreed that an expert should examine the lithographic stones in controversy in use by the defendants, and judgment was entered accordingly. Afterwards the plaintiffs brought an action to have it declared that the former judgment was obtained by fraud, alleged that the defendants had fraudulently cancelled certain stones used by them from the expert, and had made certain false statements to him. *Held*, on the facts, that the fraud was not proved; and *semble* that a judgment could not be attacked on such grounds.—*Flower v. Lloyd*, 10 Ch. D. 327.

LANDLORD AND TENANT.—See MORTGAGE, 2.

LITERAL SUPPORT.—See EASEMENT.

LEASE.—See MORTGAGE, 2, 5.

LEASEHOLD.—See WILL, 5.

LEGACY.

A testator gave £2,000 to his grand-nephew, R. K., and £1,000 to each of R. K.'s brothers. R. K. was the third son, and had eight brothers. His eldest brother, Sir T. K., was residuary legatee of the testator to the extent of one-half his large property. *Held*, that Sir T. K., was nevertheless entitled to the £1,000 legacy.—*Kirkpatrick v. Bedford*, 4 App. Cas. 96.

LIBEL.

The Statute 6 and 7 Vict., c. 96, § 7, provides that, "whenever upon the trial of any indictment for the publication of a libel, under a plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant, by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge." The defendants, proprietors of a paper, employed an editor, to whose discretion they "left it entirely" as what should be put in; he had "general authority to conduct the business;" they never complained of the articles, nor took notice of them "one way or another." The jury found the defendants guilty, apparently on the ground that the general authority given the editor was evidence of itself that they had authorized the article complained of. *Held*, that there must be a new trial.—*The Queen v. Hilbrook*, 4 Q. B. D. 42; s. c. 3 Q. B. D. 60.

(To be continued.)

LAW STUDENTS' DEPARTMENT.

LAW STUDENTS' DEPARTMENT.

The following is an address of the President of the New York State Bar Association, delivered before that body last November. It will be of interest, especially to students about to enter on the active practice of their profession.

POSITION OF THE LAWYER IN MODERN SOCIETY.

Before I conclude this address, however, I cannot refrain from making one or two remarks upon the position of the lawyer in our modern society. That he is at least a necessary evil in all civilization, would seem to be proved by his presence in some garb in all civilized communities, in all ages, from the earliest time to the present hour. In the dawn of nations he generally is found combining the attributes of priest with those of lawyer, the laws being supposed to be the gifts of the gods to men, and to be known by, as especially communicated to, their ministers. The lawyers were, among the early Hindoos and Egyptians, a privileged class or caste having alone and preserving jealously and secretly the knowledge of the laws. They were thus regarded with almost superstitious veneration as, to this day, they are still regarded among the Hindoos, where so many features of man's early institutions, as they existed in the world's infancy are, wonderfully preserved, like fossils of a former geological era.

Yet it must be confessed that, in modern times, there has been strongly impressed upon the world's imagination a dark view of the lawyer and his pursuits. Rabelais, Ben Jonson, Beaumont and Fletcher, and many other writers, all have found an appreciative audience for their satires and flings against the legal profession. Hear Ben Jonson describe us in the age of Shakespeare :

I oft have heard him say, how he admired
Men of your large profession, that could speak
To every cause, and things mere contraries,
Till they were hoarse again, yet all be law ;
That, with most quick agility, could turn
And return ; make knots and undoe them ;
Give forked counsel : take provoking gold
On either hand, and put it up : these men
He knew would thrive with their humility
And (for his part) he thought he would be blest
To have his heir of such a suffering spirit
So wise, so grave, of so perplexed a tongue
And loud withal, that would not wag nor scarce
Lie still without a fee : when every wor
Your worship but lets fall is a zeochin.

The picture which Rabelais gives of the

"furred cats," as he called the advocates of his time, is absolutely ferocious in its bitterness.

Turning to the contemporary dramatists, Boucicault and others, we find the advocate generally handsomely used, but the attorney most outrageously maltreated and abused. Indeed, it is difficult to imagine any thing more revolting than the figure usually cut by a stage attorney. He is depicted as meanness itself—vulgar, impudent, prying, without modesty or veracity, to whom honour is nothing but a word, offering his person to be kicked and himself to be reviled, if, by that means, any money can be made. I do not know how it may be with others, but when this libel on us appears on the stage, I can hardly keep my countenance. It is needless to say that, whatever else may be true of us, these disgusting pictures are not even good caricatures. They have not the merit of suggesting the reality. It is difficult to conjecture how they could have originated, or what circumstances retain them in dramatical composition, for they have not the most remote resemblance, even in caricature, to the real average attorney, either English or American.

Nevertheless, the fact we cannot disguise, that these delineations are received with some favour in the community, and do not seem to inspire much aversion by their improbability. Indeed, any slighting allusion to the profession in public utterances of any kind, jokes upon their assumed indifference to truth, and upon their alleged unprincipled adroitness, seem sure to raise a malicious laugh among the vulgar. As to the cause of this, so far as it exceeds the usual appetite for satire upon all established institutions, I have, I confess, always been somewhat puzzled.

But putting aside all satires, jokes, calumnies and denigrations and looking at the lawyer, as he should be, learned in the law, skilful in debate, yet upright and honourable, the question will, nevertheless, sometimes recur :

Is, after all, our art a useful art, in the best sense of the term, or are we, by our very constitution, an anomaly and a needless incumbrance in society? Can we, when challenged, give a good reason for our existence in the world as it now is ; much more, can we vindicate the propriety of our existence in the world, organized as it should be? There are those who will answer all these questions decidedly, nay violently, in the negative. Sociologists, economists, constitution mongers, communists, there are, who deny the necessity or propriety, in human society, of any lawyers at all. Surgeons and doctors, according to them, we must always have. Men

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cannot dispense with them. So with engineers, schoolmasters, bakers, carpenters, possibly priests, but by no means lawyers. In society, constituted as it should be, and certainly will be in the future, say they, justice and the protection of laws will be free. Magistrates will sit learned in the law, wise and just, to whom there shall be free access to all. They will decide all controversies; the parties will themselves come before them and submit their cases; they will examine witnesses, and if necessary, will send officers to bring such witnesses before them, and the allegations of the parties having been heard, the witnesses examined, the law considered, a just and unbought judgment will be pronounced, and the citizen will have it as a right as he has all other blessings of government. When society shall be reorganized, it will be thought monstrous that there ever was interposed between the citizen and a magistrate, a class who must be paid before a man can have justice, through whom it is necessary to approach the judgment seat, and whose vocation it is to live upon the differences and strifes of their fellow-men. It will be thought that society fails of its purpose, if a citizen who had sold his property and is cheated of the price, or who has been assaulted or personally injured, or who has suffered any of the many wrongs to which he may be liable from the fault or faithlessness to obligation of others, cannot demand and obtain from the authorities redress from wrongs and justice for his cause, unless he stands ready to pay a class for presenting his case, and incurs the danger of reimbursing his opponent the money he also has been obliged to pay out to the same class.

To all this the answer is, that the function of the lawyer is really, as it has been found to be in all ages and in almost all civilized societies, a necessary function for the carrying on of social life among men. That function is two-fold. One branch of it is to acquire a knowledge of the laws and to impart that knowledge to the client, sometimes advising him beforehand with reference to a transaction, and sometimes, after the event, advising him as to his rights and remedies and his means of enforcing them. This branch is that of the counsel. Another branch is to present his client's claim for redress to the magistrate, or to resist an unjust claim presented against that client, in either case to bring out the facts before such magistrate, by the close and skilful examination and cross-examination of witnesses; to call the attention of the court to the law applicable to them, and to look to it that the client, whom he represents in his legal controversy with another, shall suffer no wrong—and in saying

"suffer no wrong," I mean legal wrong—a violation of the law in his person—not what this one or that one shall think a wrong, but what the laws have declared to be wrong. This branch is that of the advocate. The performance of these functions are necessary to the smooth working of every civilized community. They cannot be exercised but by a trained and skilful class. If, as Burke has said, the ultimate aim of the whole machinery of government—kings, lords and commons—is to get into the jury box twelve honest, impartial jurors to decide upon the rights of a citizen, the accomplishment of that aim would be useless, unless when collected there, the facts and law of the case could be presented fully and completely. To do this the legal profession is a necessary instrument.

Laymen sometimes speak and think as if every case presented a clear issue of right and wrong which could be easily discovered by the mere statement of the parties. But in a civilized community the question of rights of property and person, which actually arise, are infinitely various, and frequently present complex aspects in which the morally right and the morally wrong cannot be discovered. The point to be decided is sometimes, whether, where a loss is inevitable, which of two innocent parties is to be the loser; sometimes whether the terms of a contract, that of an underwriter for instance, throw a burden upon a party, as to which he has no moral obligation whatever; sometimes a question of the descent of property; of liability for the acts of others and a thousand other difficulties *which are not invented by lawyers*, but which inevitably arise in complex relations and dealings of civilized peoples, and which must be disposed of and decided one way or the other. To the disentanglement of these matters, to the presentation of the many considerations and principles which should apply to their decision, the assistance of a trained class is absolutely necessary. The attempt to dispense entirely with it has, in some Mahometan countries, converted the administration of justice into an arbitrary chaos of iniquity, confusion and corruption.

Such a class is obviously the most important and most influential that can exist in a community. It should be skilled and cultured. It should be upright and inflexible, free from all taint of trickery or knavery, pure and blameless in its dealings with men, spotless in its conduct as the robe of Justice herself whose ministers it is.

Neither do I believe, notwithstanding what is sometimes claimed, is there anything in the proper exercise of its duties, having the slightest tendency to crook the moral rectitude or undermine the manly

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character of its professors. Listen to the saying of wise, just and disinterested critics on this subject :

"I asked Dr. Johnson," says Boswell, "whether, as a moralist, he did not think the practice of the law, in some degree, hurt the nice feeling of honesty." Johnson: "Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion; you are not to tell lies to a judge." Boswell: "But what do you think of supporting a cause which you know to be bad?" Johnson: "Sir, you do not know it to be good or bad till the judge determines." (And let me pause here to ask how many times, in your experience, the cause which you thought to be good turns out to be adjudged bad, and more rarely the cause which you were inclined to believe to be bad in law turned out to be good?) But to return to Dr. Johnson "I have said," he continues, "you are to state facts fairly, so that your thinking or what you call knowing a cause to be bad, must be from reasoning, must be from supposing your argument to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it, and if it does convince him, why, then, sir, you are wrong and he is right. It is his business to judge, and you are not to be confident, in your own opinion, that a cause is bad, but to say all you can fairly for your client and then hear the judge's opinion."

If the doctor here appears to reason a little too narrowly and subtly, let us turn to a mind of wider, and perhaps, more equitable vision—to Coleridge:—"An advocate as a right," he says, "it is his bounden duty to do every thing which his client might honestly do, and to do it with all the effect which any exercise or skill, talent or knowledge of his own may be able to produce. But the advocate has no right, nor is it his duty, to do that for his client which his client, *in foro conscientie*, has no right to do for himself, as for a gross example, to put in evidence a forged deed or will, knowing it to be so forged." * * * "It is of the utmost importance," he says again, "in the administration of justice, that knowledge and intellectual power should be, as far as possible, equalized between the crown and the prisoner or plaintiff and defendant. Hence, especially arises the necessity for an order of advocates—men whose duty it ought to be to know what the law allows and disallows, but whose interest should be wholly indifferent as to the persons or character of their clients. If a certain latitude in examining witnesses is, as experience seems to have shown, a necessary means towards the evisceration of the truth

of matters of fact, I have no doubt, as a moralist, in saying that such latitude, within the bounds now existing, is justifiable."

So much for the opinions of these great men upon the duties of the lawyer and their moral tendencies.

That there is nothing in the proper exercise of our profession that at all conflicts with the most rigid and exact requirements of the moral code, we all feel certain. However keen our abilities, however persuasive our rhetoric, however profound our knowledge, keeping within the bounds of professional ethics, we may boldly, unhesitatingly, and with a clear conscience, exercise them all to their full extent. No client buys, or should ever be able to buy from his counsel, his conscience, his sense of honour, or his manly character. He has a right to the exercise of all his knowledge and all his faculties as his representative in the court. He has a right to his most strenuous efforts to place before the court or the jury, as the case may be, all the facts, all the arguments, and all the favorable aspects of his case which can be reasonably presented. More than that he cannot ask; more than that no honorable counsel will ever give.

Let me say, in conclusion, to me, it seems, that to be conversant with the laws and to be engaged in interpreting them and applying them to the exigencies of human affairs, is not only morally, a permissible career, but perhaps the highest, the noblest secular pursuit in which man can be employed. So far from tending to deteriorate the moral tone, it intensifies every feeling for, and renders acute every sense of righteousness, of equity and of uprightness.

The laws, after all, but attempt to bring to the government of human affairs those eternal rules of action which are among the loftiest conceptions of the human mind. They are all but imperfect translations of that law of nature which Cicero himself, the greatest of advocates, in a fragment preserved to us by Lactantius, so nobly describes. "Law," he says, "is no other than right reason agreeing with nature spread abroad among all men, ever consistent with itself, eternal, whose office is to summon to duty by its commands, to deter from wrong by its prohibitions. In contradiction to this law nothing can be laid down, nor does it admit of partial or entire repeal; nor can we be released from this law, either by vote of the Senate or decree of the people, nor will there be one law at Athens and another at Rome, one now and another hereafter; but ONE ETERNAL, IMMUTABLE LAW WILL EMBRACE ALL NATIONS AND EXIST IN ALL TIMES."—*Albany Law Journal*.

LAW STUDENTS' DEPARTMENT—REVIEWS.

SECOND YEAR SCHOLARSHIP.

Snell's Equity.

1. Distinguish between trusts executed and trusts executory. Give an example of each. In what respect will their construction differ?

2. In what respect may the Court of Chancery be said to favour charities?

3. In whose favour will the Court presume an advancement when property is purchased in the name of another? Does a married woman, with respect to purchases made out of her separate estate, stand in the same position as a man in respect to purchases made by him in the name of another?

4. What are the rules as to devolution of property where the purposes for which conversion has been directed have partially failed before the instrument directing the conversion has come into operation?

5. Can a mortgagee in possession after default of payment of the money due upon the mortgage make a valid lease? Discuss the position of the parties.

THIRD YEAR'S SCHOLARSHIP.

Taylor's Equity Jurisprudence.

1. In what cases will the Court aid the defective execution of a power?

2. In what cases will the court relieve on the ground of mistake? Two persons are jointly bound by a bond; the obligee releases one, supposing that the other will remain bound. Is there any relief in Equity?

3. In what cases will the Court relieve on the ground of misrepresentation?

4. Distinguish between contracts of insurance and contracts of suretyship, as to the effect of non-disclosure of material circumstances.

5. After a contract for the sale of real estate has been made in writing, a variation of the terms is agreed to. Can evidence of this variation be given in a suit for the specific performance of the agreement?

THIRD YEAR SCHOLARSHIPS.

Fisher on Mortgages—Real Property Statutes.

1. Show clearly the distinction between a mortgage and an absolute conveyance with the condition that the grantor may repurchase within a certain time.

2. After litigation commenced, the plaintiff and defendant agree to settle their differences, the defendant paying to the plaintiff a certain sum. The plaintiff then refuses to pay his solicitor's bill of costs, and being worthless, the amount cannot be recovered from him. Has the solicitor any claim for his costs against the defendant? Answer fully; state the ground of the right, the circumstances under which it would arise, and the mode of its enforcement.

3. When will an account against a mortgagee in possession be taken with rests, and when not?

4. Is there any obligation upon an adult or infant tenant in tail, or upon a tenant for life, or upon a tenant for life with an absolute power of appointment, to keep down interest upon a mortgage?

5. What are the rules as to the costs of a defendant in a mortgage case who disclaims?

REVIEWS.

MUNGER ON THE APPLICATION OF PAYMENTS

BY DEBTOR TO CREDITOR: A treatise on the application of payments by debtor to creditor; being a complete compilation of the law pertaining to the rights of debtor and creditor respectively; and also giving the various rules for the guidance of the Courts when no appropriation has been made by the parties. George G. Munger, late Judge of Munroe County, N.Y. New York: Baker, Voohris & Co., 66 Nassau St., 1879. Carswell & Co., 66 Adelaide St., Toronto.

This supplies a want to many who would otherwise have collected their information from a number of books. The author, in his preface, says:—

"Having occasion to make a thorough examination of the principles regulating the Application of Payments by Debtor to Creditor, he found the learning upon the subject in a very fragmentary condition. He discovered that not only was there no separate treatise embodying the law in clear and concise form, but even that there was not any systematic and exhaustive collection of its doctrines and rules anywhere."

The law on this subject being general the book will be of as much advantage here,

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apart from our own decisions, as if written here. Judge Munger seems to have done his work well, and, although exception may be taken to the headings of his chapters as inexpressive, the mode of treatment in stating a proposition of law, which is there amplified and sustained, is convenient and scientific.

A DIGEST OF THE LAW OF EVIDENCE AS ESTABLISHED IN THE UNITED STATES, adapted from the English work of Sir James F. Stephen, K.C.S.I., by William Reynolds, of the Baltimore Bar. Chicago, Ill.: Callaghan & Co., 1879.

This is an adaption for the use of American lawyers of Sir James Stephen's well-known book. The author gives all the information there given, which is applicable to the Courts in the United States. The compiler gives the author's admirable introduction and preface to his third edition. Mr. Reynolds has so arranged his book that the reader can readily distinguish between the original and the new matter. It cannot but be of great assistance to his professional brethren in the United States, and for us, in this Province, the citation of the leading authorities in that country will often be very useful. The general appearance of the book is most inviting.

AMERICAN LAW REVIEW. Little, Brown & Co., Boston, U.S.

This valuable publication is now published monthly instead of quarterly. We wish the enterprising editors and publishers every success. This review is one of the ablest, as it is certainly the most thorough in its leading articles, of all the legal serials. The expectation of the publishers that it will receive the support of the scholarly as well as the popular side of the profession is not likely to be disappointed, if the past is any criterion of the future. The writers have been and are men of distinction and ability and the staff is said to have been increased. We cordially recommend this periodical to our readers.

ALBANY LAW JOURNAL. Weed, Parsons & Co., Albany, N.Y.

This periodical takes the same position amongst the United States weekly journals as the *American Law Review* now does amongst the monthlies. The amount of information given is immense, and the sprightly and at the same time accurate way in which the editorials are written is very attractive. A recent number gives the obituary notices of its first editor and founder Mr. Isaac Grant Thomson. An examination of its earlier volumes will show the extent to which the *Journal* was indebted to his clever and facile pen.

CRIMINAL LAW MAGAZINE. Fred. D. Linn & Co., Jersey City, U.S.

This is a new venture, and if we may judge from the first number likely to be a success in a country with such a large constituency to draw from as the United States. The leading article, on Presumptions in Criminal Cases, is from the pen of Francis Wharton, L.L.D. A number of important cases are given in full as also a full digest of recent criminal cases. We welcome this magazine amongst the list of our exchanges.

LITTELL'S LIVING AGE, BOSTON, U.S.—The number of *The Living Age* for the weeks ending February 7th and 14th respectively, have the following contents: "The Force Behind Nature," by Dr. Wm. B. Carpenter, *Modern Review*; "The Roman Breviary," "Bush-Life in Queensland," "Contraries of Medicines," and "Pindar's Hymn to Persephone," *Blackwood*; "The Character and Writings of Cyrus the Great," "The Letters of the Late Mr. Dickens," and "Justinian," *Contemporary*; "Old Fashioned Gardening," *Nineteenth Century*; "Earth-bound: A Story of the Seen and the Unseen," by Mrs. Oliphant, *Fraser*; "Fighting Fitzgerald," *Cornhill*; "Windfalls, Confidants, and The Restoration of the Jews," *Spectator*; "The Colour of the Sea," *Science for All*; "Flow of Viscous Materials, a Model

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Glacier," *Nature*; with an instalment of "He who will not when he may," by Mrs. Oliphant, and the usual amount of poetry.

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*Sheriffs' Fees.**To the Editor of THE LAW JOURNAL.*

SIR,—In the February number of your journal I observe a letter signed "B" alluding to a pamphlet I have issued entitled "The Sheriffs' Petition with statement of grievances, &c." The letter contains several statements which call for a reply and corrections from me; but it is neither my intention nor desire to enter into a correspondence upon the subject; my book, with the facts I have gathered, is before the public, and in the hands of the Legislature, and I am ready and willing to give proofs of the correctness of any charges I have made before any tribunal selected for that purpose. For the present I only ask the privilege of inserting in your journal this letter with the correction of some misstatements which "B" has made, that are likely to mislead his readers, and which may be taken as a fair specimen of the correctness of "B's" criticisms throughout.

"B" demurs at my charging some legal practitioners with collecting Sheriff's fees and "much more," giving as his reason for denying that they do so, that, with the exception of Mr. Cahill, none have actually so named their overcharges; I argue that the overcharges in the taxed bills of cost which I have given amount to more than the legal fees and the Sheriff's fees combined; and, therefore, those gentlemen cannot claim that they served the papers for the sake of reducing costs to the litigant, though some of them have, in the House of Parliament, and through the press, declared that such was their sole motive; and from these premises, I think, I may fairly infer that the 9,317 writs and bills not served by the Sheriffs have been served by the attorneys, and for their own benefit. "B" is in error in saying that the transaction in the case of *Gearing v. Whipple* was between Mr. Cahill and my "own deputy." The per-

son whom he assumes to have been my Deputy was a young man who acted as clerk in my office—since dismissed.

Again "B" copies from my book showing that the fees on the 20,380 bills in chancery and writs of summons issued in 1876 would amount to \$43,744.95, and from this data (which is correct) arrives at the conclusion that had all the services in that year been made by the Sheriffs each of the thirty-seven would have received the average sum of \$1,182.92. "B" seems to have entirely forgotten the existence of such officers as bailiffs who must be kept and paid by the Sheriffs; there are upwards of forty of these officers constantly employed in the Province who, as a rule, are paid by receiving half the fees for process-serving; therefore we must deduct \$21,872.48 as the bailiffs' share of the fees, leaving the other half to be divided amongst the Sheriffs, giving each an average of only \$591.46, instead of \$1,182.48 according to "B's" calculation. But whether \$591.46 was not the actual average received by the Sheriffs, in consequence of the fact that of the number of bills in chancery and writs of summons, no less than 9,317 were served by others than the Sheriffs. The fees belonging to these 9,317 bills and summonses would have amounted to \$20,506.05 which must be deducted from the \$43,744.95, leaving only \$23,238.90 as the gross receipts received by the Sheriffs for process-serving in 1876. From this sum deduct one half for bailiffs' services, and we have left \$11,619.45 for the Sheriffs themselves, an average of \$314.03 instead of the large sum of \$1,182.95 as stated by "B." "B" has kindly undertaken to enlighten myself and the public as to the amount of fees I would have received had I served all the 1,346 bills and writs of summonses issued in Wentworth in 1876. He shows correctly enough from my own book that the serving fees on these papers would have amounted to the sum of \$2,755.75; but here again he overlooks that one-half of this sum would have been paid the bailiffs for serving them, reducing my share to \$1,388.85, but not more than half of these papers were issued for service in this county. But if that half had been served,

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my net emoluments after deducting the bailiffs' fees would have been \$674.42, and for "B's" information I will state the exact number of these papers served by me with the emoluments derived therefrom :

Of the 163 bills in chancery I served	
36 at \$2.25	\$81 00
Of the 404 summonses in S. C. I served 75 at \$2.70.....	202 50
Of the 779 summonses in C. Court I served 191 at \$1.80.....	343 80
	<hr/>
	\$627 30
Deduct for bailiffs' fees (one half)	313 65
	<hr/>
	\$313 65

Sheriffs' net proceeds for serving papers issued for service in my county in 1876 being less than one ninth the sum "B" would lead the public to believe I should have secured. I shall leave it for "B" to answer who served the balance of the 1,346 bills and writs and got the fees. There are several other statements in "B's" letter quite as fallacious as the examples I have given ; but I shall touch on no more at present, hoping to have an opportunity at no distant period of discussing the subject before a committee of the Legislature, perhaps in "B's" presence, where the public will be enabled to judge between us. In conclusion I beg to say that I fully agree in some of "B's" remarks. His proposal to have an Inspector of Sheriff's Offices is one which I highly approve ; and have already pressed upon the Attorney General, believing it to be a step calculated to benefit the lawyers, the Sheriffs and the public.

Were such an officer now in existence the grievances of which the Sheriffs complain would be investigated, and the result of the inquiry communicated to the Government by a reliable officer of their own. "B's" suggestion that the Sheriff's fees should be curtailed in the same way as the Registrars is a good idea, and will commend itself to the Legislature. The emoluments of some of the shrievalties are very small, the Sheriffs receiving less than the Division Court bailiffs. Let the services be made as proposed in my Bill and upwards of \$20,500 now lost to the Sheriffs through others doing their work would be secured to them,

thus enabling them to contribute to a fund which might be called the "Supplementary and Inspection Fund," from which the Inspector could be paid, and the poorer shrievalties supplemented and brought to a fair and reasonable income, without doing injustice to any of the Sheriffs or adding any additional burdens on the people. I simply propose that the 9,317 bills and summonses now served by others than the Sheriffs, and the emoluments accruing therefrom, amounting to upwards of \$20,500 annually should be given to the Sheriffs and not to the Process-serving Attorneys as is the case at present. By doing this the proposed fund would be ample to give the necessary aid to the poorer Sheriffs and bailiffs. I shall do all I can to assist "B" in giving effect to his excellent idea ; but I shall expect him to reciprocate by assisting me to secure the services and the emoluments I have named which is necessary to create such a fund as he proposes.

While "B," whom I presume is a professional gentleman, sees how the Sheriff's fees can be curtailed and sounds a note of warning, he seems oblivious to the fact that his own fees may be curtailed also. It was only the other day that I was asked by a member of the Legislature "if the bill of costs in *Whipple v. Gearing* which I published, could be taken as a fair sample of lawyer's costs," adding that if it were so the time had arrived for taking the matter into the hands of the Legislature and revising the whole tariff of fees. If this should be done the fees are not likely to be increased.

I regret very much that "B." did not publish his letter in some paper more generally read than the *LAW JOURNAL*, which, I presume, is principally seen by the members of the Legal profession. The subject is one in which all classes of the community are interested, and all should have an opportunity of forming a judgment as to the question at issue ; thence my desire to give it all the publicity in my power.

Yours, &c.,

ARCH'D McKELLAR,
Sheriff Co. Wentworth.

Hamilton, Feb. 19, 1880.

CORRESPONDENCE.

[We willingly publish the above letter in answer to the criticism of our correspondent on the pamphlet referred to. It is for Mr. McKellar, of course, to judge whether it strengthens his case by attempting to tackle only one part of the undoubtedly strong case made against him. Whether he has done so or not the reader can judge for himself by examining both arguments. Mr. McKellar says he is "willing to give proofs of the correctness of any charges he has made." All that can be said as to this is, that such proofs would be, in many cases, in contradiction of his pamphlet.

But, after all, it is of little moment, for we understand that the ventilation given to that production has rendered copies somewhat scarce; and so much the better for the credit of its author, who would probably be as well pleased as the rest of his brethren if it had never gone beyond the few members of the Legislature amongst whom it was distributed.

As to the threat of a reduction of lawyer's fees, they are so small now that it would be beneficial to the profession if they were done away with altogether, as the result would be that fees would practically be whatever the lawyer might choose to make his own client pay. Instead of a successful plaintiff making all his costs out of a defendant who had wrongfully contested a claim, he would have to pay his own lawyer. In some countries tariffs of costs are either unknown or a dead letter; and when a client wants a suit brought he has to pay a good round sum to the lawyer before the suit is brought. We doubt, however, if this would suit the mercantile men of this country.

We understand that "B" has published his letter in pamphlet form, so that the want of publicity which Mr. McKellar says he regrets will be to a certain extent overcome.—Eds. L. J.]

Unlicensed Conveyancers.

To the Editor of THE LAW JOURNAL.

Your correspondent "An old Subscriber," in your issue in January last, seems to think the remedy to apply to this case is

for lawyers to charge no larger fees than the unlicensed conveyancer. If he will try it I think he will find himself disappointed with the result. Those who employ the unprofessional man, do so in most cases, I believe, not on account of any saving, but because they prefer having as few questions asked about their title as possible; lawyers knowing the irresponsibility are, of course, compelled to ask the purchaser if he requires the Solicitors to be responsible for the title, and it so frequently leads to difficulties that the seller prefers going to an unprofessional man who will "do the deed" and hold his tongue, or if he searches the title be satisfied with a look at the abstract index in the Registry Office.

And I think he will find in the great majority of cases where a Solicitor is employed that it is at the instance of the purchaser, and not the seller.

If I am correct in this view of the case the Legislature should intervene and protect the public, the principle being already admitted by our law.

Yours,

WM. B.

Walkerton, Feb. 13th, 1880.

To the Editor of the LAW JOURNAL.

DEAR SIR,—I am sincerely glad that your powerful Journal has consented at last to aid those members of the profession practising outside County Towns, in obtaining some protective measure against "Unlicensed Practitioners." I use the word, advisedly, as there are few of the so-called conveyancers who do not also pretend to practise law; in fact there are two of these gentlemen residing in a village not over fifteen miles from here who openly give advice, charge for it, and take and defend suits in all the Courts; carrying on their Superior and County Court cases through the agency of attorneys at the different County Towns who undertake the work on even better terms than they do for a brother attorney. It has been truly remarked by one of your correspondents "that if you take away from a country practitioner Division and Surrogate Court work and conveyancing, there is but little left for him to do," for after pay-

CORRESPONDENCE.

ing Toronto and County Town agents, there is a very small margin remaining in a Superior or County Court cause to the country solicitor, and even for this morsel he is obliged to contend with these "pettifoggers." Again in this County, to say nothing about the number of self-styled lawyers (and their name is legion) we have ten or eleven Division Court clerks, and nearly as many bailiffs, nearly all of whom undertake to do conveyancing and to act as attorneys or agents in the collecting of debts. Some even go so far as to engage two or more partners to assist them in raking up suits for their Division Court mill. For example, notice the enclosed advertisement clipped from a local paper. They are all in a row in the following suggestive fashion :—

<p>OFFICE OF THE DIVISION COURT.</p> <p>D. D. HAY.</p>	<p>HAY & HAMILTON. CONVEYANCERS, INSURANCE, AND REAL ESTATE AGENTS. Special attention given to the collection of Notes and Accounts. OFFICE :—No. 10, Mechanics' Block, South Side Main Street.</p> <p>W. J. HAY.</p>	<p>FIRE INSURANCE A SPECIALITY. None but first class Companies represented. MONEY TO LOAN.</p> <p>S. J. HAMILTON.</p>
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I might add that Mr. R. Hay is the Division Court Bailiff. One is irresistibly reminded of the chorus in the "Pinafore."

Now surely we are not asking too much from the Benchers to at least endeavour to put a stop to attorneys at County Towns acting for pettifoggers in outlying places, for it is certainly unfair that we should be compelled to submit to this, and if the Legislature is indifferent to our interests, then on the grounds of public policy, if for no other reason, something should be done to prevent Division Court clerks and bailiffs interfering with matters outside their duties, particularly as these gentlemen will no doubt succeed in lobbying through the Bill, extending the jurisdiction of these Courts. It is beyond contradiction that over one-third the actions brought in the Division Courts of many counties are at the instigation of the clerks and bailiffs themselves, and in fact placed in Court by them or their partners acting as agents or collectors, and I need hardly refer to the evil which must result if such proceedings are permitted. Many a poor and honest debtor knows to his sorrow what it is to

have the clerk or bailiff of his division acting as his creditor's attorney, and many an unfortunate creditor has realized that if the debt was not collected there was one certainty left him, viz., that the bill of costs would be large enough. Now, sir, it must be apparent to the members of the profession practising outside the County Town, that with an increased jurisdiction for the Division Court, and when clerks and bailiffs act as agents in collecting debts, when any person is permitted to act as counsel in these Courts, and when no protection is given against conveyancers and unlicensed practitioners, it is useless to continue our allegiance to a Society which permits any outsider without cost or even responsibility, to enjoy all the privileges and benefits sup-

posed to belong only to the duly qualified attorney, and it certainly seems a loss of precious time and money to strive to obtain a profession when any one may practise at your very door with impunity.

Yours &c.,

COUNTRY PRACTITIONER.

Legal Legislation.

To the Editor of THE LAW JOURNAL.

DEAR SIR,—I am glad to see that the Judicature Act, the Division Court Act, and other questions of so called amendments to legal procedure, are at present under the careful consideration of the Local Legislature. The Legislature is composed of a large number of farmers, some storekeepers, a Doctor or two, a Division Court Clerk, a few lawyers, and some of their illegitimate brethren, the "unlicensed conveyancers," editors of country papers, &c. These gentlemen, I am told, can all read and write, and even the most unlearned have served as jurors or had suits of their own. I congratulate the country upon the prospect of the result of these deliberations.

CORRESPONDENCE—SPRING CIRCUITS.

It is not expensive either, and will no doubt be thorough, as they are all so familiar with the subjects. The lawyers of course take their part in the debates, and I am glad to see that they are unselfishly anxious to sacrifice their profession and the administration of justice to popular prejudices.

Yours, &c.

A. B.

Unlicensed Conveyancers—County Court Clerks.

To the Editor of THE LAW JOURNAL.

DEAR SIR—The last issue of your Journal contains some correspondence and an editorial on the subject, which must meet the approval of the legal profession, and which should have the approval also of every intelligent man outside of the profession, including those who feel that they are competent to act as conveyancers.

If it were made necessary for non-professional persons practising as conveyancers to obtain a license or certificate, as suggested by your correspondent, those who were able to pass an examination would occupy a much better position than they do now, and no one can deny that weeding out the incompetent would be a benefit to the whole community.

I quite agree with the suggestion that County Court Clerks should be prohibited from practising as conveyancers. If it were proper to interfere in the case of Registrars, it must be equally so in respect to those who have the custody and registration of chattel mortgages, and bills of sale.

County Court Clerks are no doubt, as a body, men of good standing and reputation; but so are County Registrars, and the rule which applies to one should be made to apply to the other. The temptation to do wrong should not be placed before anyone, and there can be no doubt but that allowing persons occupying the position which County Court Clerks do towards the public, to draw up the instruments they are to have the custody of, gives to them, or their assistants, an opportunity of committing frauds, with almost entire immunity from detection.

I know a County Court Clerk who draws more chattel mortgages than half the conveyancers in his County do, together, and, although he is a person above the suspicion of wrong doing, it is impossible for conveyancers who are responsible for what they undertake to do, not to feel, that in such a case, there is a lack of protection to themselves and the public, for which there is no reasonable excuse.

Yours,

D. W.

[We would commend this matter to the attention of the Attorney General. It is very important in the interest of the public. Eds. L. J.]

TO CORRESPONDENTS.—J. M.—We have received your letter as to the Law School; but have no space for it in this number.

A. G. M.—Judgment as to School Trustee Election received, will appear in next issue.

CHANCERY SPRING CIRCUITS.

The Hon. The CHANCELLOR.

Toronto.....Tuesday.....May 18

EASTERN CIRCUIT.

Hon. The CHANCELLOR.

Lindsay.....	Tuesday.....	March 30
Peterborough..	Friday.....	April 2
Cobourg.....	Tuesday.....	" 6
Belleville.....	Monday.....	" 12
Kingston.....	Tuesday.....	" 20
Brockville.....	Monday.....	" 26
Cornwall.....	Friday.....	" 30
Ottawa.....	Wednesday.....	May 5

HOME CIRCUIT.

Hon. V. C. BLAKE.

St. Catharines..	Thursday.....	May 6
Whitby.....	Monday.....	" 10
Brantford.....	Monday.....	" 17
Simcoe.....	Thursday.....	" 20
Guelph.....	Tuesday.....	" 25
Barrie.....	Monday.....	" 31
Owen Sound...	Friday.....	June 4
Hamilton.....	Tuesday.....	" 8

SPRING CIRCUITS.

WESTERN CIRCUIT.

Hon. V. C. PROUDFOOT.

Stratford.....	Wednesday.....	March 24
Walkerton.....	Monday.....	" 29
Goderich.....	Monday.....	April 5
Woodstock.....	Tuesday.....	" 13
Sarnia.....	Monday.....	" 19
Sandwich.....	Wednesday.....	" 21
Chatham.....	Monday.....	" 26
London.....	Thursday.....	" 29

SPRING ASSIZES.

EASTERN CIRCUIT.

Hon. Mr. Justice PATTERSON.

1. Pembroke....	Monday.....	29th March.
2. Perth.....	Monday....	5th April.
3. Cornwall....	Monday.....	12th "
4. Ottawa.....	Monday.....	19th "
5. L'Original....	Monday.....	3rd May.

MIDLAND CIRCUIT.

Hon. Mr. Justice OSLER.

1. Belleville....	Monday.....	15th March.
2. Kingston....	Thursday....	1st April.
3. Brockville....	Monday.....	12th "
4. Napanee.....	Monday.....	26th "
5. Picton.....	Thursday....	6th May.

VICTORIA CIRCUIT.

Hon. Mr. Justice BURTON.

1. Brampton....	Monday.....	29th March.
2. Whitby.....	Monday.....	5th April.
3. Cobourg.....	Monday.....	19th "
4. Lindsay.....	Monday.....	3rd May.
5. Peterborough.	Monday.....	10th "

BROCK CIRCUIT.

Hon. Mr. Justice ARMOUR.

1. Stratford.....	Monday.....	8th March.
2. Woodstock....	Monday.....	15th "
3. Goderich.....	Monday.....	22nd "
4. Walkertou....	Tuesday....	6th April.
5. Owen Sound..	Tuesday....	13th "

NIAGARA CIRCUIT.

Hon Mr. Justice MORRISON.

1. Milton.....	Monday.....	29th March.
2. Hamilton....	Monday.....	5th April.
3. Welland.....	Monday.....	19th "
4. St. Catharines.	Monday.....	26th "
5. Cayuga.....	Monday.....	3rd May.

WATERLOO CIRCUIT.

Hon. Mr. Justice CAMERON.

1. Barrie.....	Tuesday....	30th March.
2. Guelph.....	Tuesday....	13th April.
3. Berlin.....	Monday.....	26th "
4. Brantford....	Monday.....	3rd May.
5. Simcoe.....	Tuesday....	11th "

WESTERN CIRCUIT.

Hon. Chief Justice WILSON.

1. Sandwich.....	Tuesday....	9th March.
2. Sarnia.....	Tuesday....	16th "
3. Chatham.....	Tuesday....	23rd "
4. St. Thomas..	Tuesday....	30th "
5. London.....	Tuesday....	6th April.

HOME CIRCUIT.

Hon. Chief Justice HAGARTY.

Toronto (Assize and Nisi Prius)	} Thursday...16th March.
Toronto (Oyer and Terminer).	
	Thursday...22nd April.

The Hon. Mr. Justice Galt will remain in Toronto to hold the sittings of the Queen's Bench and Common Pleas each week, and for the transaction of business by a Judge in Chambers.

FLOTSAM AND JETSAM.

We are sorry to hear that the condition of Mr. Baron Huddleston is such as to cause serious anxiety, and there are grave doubts whether he will be able to resume his seat on the bench.

The *Albany Law Journal* says: A correspondent writes us in regard to the "yew tree case," where the horse died by cropping the leaves of a yew tree planted in a burial ground adjoining his pasture, that it was an appropriate application of the maxim, "sick yew-tree, chew-oh."

A book has recently been published in London, entitled "Over One Thousand Useful and Entertaining Legal Facts for one Shilling." Among other startling facts we find the following: "When a house is taken on an ordinary yearly tenancy, notice must be given so as to expire at the same time as the tenancy commenced, unless there is a special agreement to the contrary." That is what one would call a short lease. Again: "A child born w.th n nine months after

FLOTSAM AND JETSAM.

marriage is legitimate"—a statement, says the *Law Journal*, "not so much startling in itself, as in the inference from it that children born ten months after marriage are illegitimate."

The following important judgment has recently been given by the Supreme Court of the United States, in the case of *The New York Central and Hudson River Railroad Company, v. Fraley*.

It is competent for passenger carriers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable, and not inconsistent with any statute or its duties to the public, to protect itself against liability, as insurer, for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk.

As a condition precedent to any contract for the transportation of baggage, the carrier may require information from the passenger as to its value, and demand extra compensation for any excess beyond that which the passenger may reasonably demand to be transported as baggage under the contract to carry the person.

The carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it is bound to assume in consideration of the ordinary fare charged for the transportation of the person.

In absence of legislation, or special regulations by the carrier, or of conduct by the passenger misleading the carrier as to value of baggage, the failure of the passenger, unasked, to disclose the value of his baggage is not, in itself, a fraud upon the carrier.

To the extent that articles carried by a passenger for his personal use when travelling exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer.

Whether a passenger has carried such an excess of baggage is not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance as to the law of the case, and its determination of the facts—no error of law appearing—is not subject to re-examination in this court.

OBITUARY.

The Right Hon. Sir William Erle, formerly Chief Justice of the Court of Common Pleas, died

on Wednesday, the 28th ult., after a few days' illness, at his residence, Bramshott Grange, near Liphook, Hampshire. Having long outlived his successor, Sir William Bovill, he has passed away at the age of eighty-seven, having thus come near to the longevity of such lawyers as Lord Brougham, Lord Lyndhurst, and Lord St. Leonards. Sir William Erle was born in the year 1793, and was the third son of the late Rev. Christopher Erle, of Gillingham, Dorsetshire, by Margaret, daughter of Mr. Thomas Bowles, of Shaftesbury, in the same county, a relative of the late eminent poet, the Rev. William Lisle Bowles. He was educated at Winchester College, from which he passed with a fellowship to New College, Oxford, where he graduated in due course, but not in honours, being a member of a college at that time privileged. He took his degree of Bachelor of Civil Law in 1818, and in the following year was called to the bar at the Middle Temple, and joined the Western Circuit, on which he rose to distinction. He obtained a silk gown from Lord Brougham in 1834, and at the general election of 1837 he entered the House of Commons as one of the members for the City of Oxford, having succeeded, after a severe contest, to the seat formerly held by Mr. Hughes-Hughes. He did not, however, hold a seat for Oxford beyond one Parliament, for in 1841 he declined to seek re-election. In 1845 he was promoted—not by his own party, but by Lord Lyndhurst—to a puisne judgeship of the Court of Common Pleas, in the room of Mr. Justice Maule. In the following year he was transferred to the Court of Queen's Bench, on which he held a seat down to 1859, when the promotion of Sir Alexander Cockburn placed at the disposal of the Ministry the chief judgeship of the Common Pleas. In both Courts he gained a reputation of a very high class, and will be remembered as a sound lawyer and able expositor of the law, as well as an acute, painstaking and conscientious judge. Since his retirement from the bench, which took place in 1866, Sir William Erle has lived the life of a country gentleman and a resident landlord on his estate at Bramshott, in the picturesque neighbourhood of Liphook and Haslemere. Here he was foremost in good and charitable works, subscribing largely to the erection of churches, schools, and parsonages. Sir William Erle received the honour of knighthood on his elevation to the bench. He was sworn a Privy Councillor in 1859. He married, in 1834, Amelia, daughter of the late Rev. Dr. Williams, Warden of New College, Oxford.

LAW SOCIETY, HILARY TERM.



Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 43RD VICTORIAE.

During this Term, the following gentlemen were called to the Bar, (the names are not in the order of merit, but in the order in which they stand on the Roll of the Society) :--

GEORGE WHITFIELD GROTE.
 WILLIAM COSBY MAHAFFY.
 P. A. MACDONALD.
 WILLIAM LAWRENCE.
 WILLIAM LEIGH WALSH.
 JOHN J. W. STONE.
 COLIN SCOTT RANKIN.
 HORACE COMFORT.
 ALEXANDER V. MCCLENNAGHAN.
 MARTIN SCOTT FRASER.
 WILLIAM PATTISON.
 WM. REUBEN HICKEY.
 GEORGE MONK GREEN.
 JAMES THOMAS PARKES.
 MICHAEL J. GORMAN.
 HARRY EDMUND MORPHY.
 CHARLES AUGUSTUS KINGSTON.
 JOHN HY. LONG.

Special Cases.

JAMES C. DALRYMPLE.
 JOHN JACOBS.

The following gentlemen have been entered on the books of the Society as Students-at-Law and Articled Clerks :--

Graduates.

PETER L. DORLAND.
 LEWIS CHARLES SMITH.
 MATTHEW M. BROWN.
 PETER D. CRERAR.
 RUFUS ADAM COLEMAN.

Matriculants.

ANDREW GRANT.
 JAMES MACOUN.
 FRANCIS R. POWELL.
 JOHN TYTLER.
 THOMAS JOHNSTON.

Primary Class.

ROBERT VICTOR SINCLAIR.

HECTOR COWAN.
 WILLIAM BEARDSLEY RAYMOND.
 WILLIAM ALBERT MATHESON.
 ARTHUR B. MCBRIDE.
 FRANK HURNBY.
 WILLIAM AUSTIN PERRY.
 JOSHUA DENOVAN.
 M. J. J. PHELAN.
 ARTHUR EDWARD OVERELL.
 ROBERT SMITH.
 HUGH MORRISON.
 JOHN MCPHERSON.
 AMBROSE KENNETH GOODMAN.
 J. A. MCLEAN.
 THOMAS IRWIN FOSTER HILLIARD.
 RANALD GUNN.
 PHILIP HENRY SIMPSON.
 JOHN GRAKE.
 EDWARD A. MILLER.
 JOHN GREER.
 DANIEL FISKE MCMILLAN.
 CHARLES ADELBERT CRAWFORD.
 FREDERICK ERNEST COCHRANE.
 WILLIAM PEARCE.
 ANDREW GILLESPIE.
 G. A. KIDD.

Articled Clerks.

G. R. VANNORMAN.
 E. M. YARWOOD.
 J. HEIGHINGTON.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :--

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
 Virgil, Aeneid, B. II., vv. 1-317.
 Arithmetic.
 Euclid, Bs. I., II., and III.
 English Grammar and Composition.
 English History—Queen Anne to George III.
 Modern Geography—North America and Europe.
 Elements of Book-keeping.

Students-at-Law.

CLASSICS.

1880 { Xenophon, Anabasis, B. II.
 { Homer, Iliad, B. IV.
 1880 { Cicero, in Catilinam, II., III., and IV.
 { Virgil, Eclog., I., IV., VI., VII., IX.
 { Ovid, Fasti, B. I., vv. 1-300.

LAW SOCIETY, HILARY TERM.

- 1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, B. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem:—

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—
1880.—Souvestre, Un philosophe sous les toits.

1881.—Emile de Bonnehose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books.—Arnett's Elements of Physics, 7th edition, and Sommerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articulated clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing,

(chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 96, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Law, and Book III. & IV. of Broom's Common Law, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Haynes's Outline of Equity, C.S.U.C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings, Equity Pleading and Practice in this Province,

The above Changes shall be in force after next Easter Term.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the 2nd Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

PROFESSIONAL ADVERTISEMENTS.

Goderich.

MALCOMSON & McFADDEN, Barristers,
Solicitors, &c.
MALCOMSON & WATSON,
Barristers, &c., Clinton.
S. MALCOMSON. W. H. MCFADDEN. G. A. WATSON.

Guelph.

GUTHRIE, WATT & CUTTEN, Barristers-
at-Law, &c., Guelph, Ontario.
D. GUTHRIE, Q.C. J. WATT. W. H. CUTTEN.

F. BISCOE, Barrister and Attorney-at-Law,
Solicitor in Chancery, Conveyancer, &c.
Office: cor. Wyndham & Quebec Sts., Guelph.

Montreal.

TRENHOLME & MACLAREN, Advocates,
&c., 13 Hospital Street.
N. W. TRENHOLME. JOHN J. MACLAREN.

Napanee.

CARTWRIGHT & GIBSON, Barristers, At
torneys-at-Law, Solicitors in Chancery,
and Insolvency, Notaries Public, &c.
Grange Block, Napanee, Ontario.
J. S. CARTWRIGHT. S. GIBSON.

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4. Sun. ...Low Sunday.
5. Mon. ...County Court Terms begin, County Court
alt. without jury (ex. York) begin.
8. Thur. ...Supreme Court Act assented to, 1875.
10. Sat. ...County Court Terms end.
11. Sun. ...Second Sunday after Easter.
18. Sun. ...Third Sunday after Easter.
23. Fri. ...St. George's Day.
24. Sat. ...Earl Cathcart, Governor General, 1846.
25. Sun. ...Fourth Sunday after Easter.
27. Tues. ...Queen Victoria proclaimed Empress of India,
1876.

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Canada Law Journal.

Toronto, April, 1880.

Mr. McCarthy, Q.C., has introduced an Act in the Dominion Parliament to get rid of the difficulty we referred to last month (*ante* p. 71) by giving the Supreme Court power to make amendments and to take further evidence when required.

The *Canada Gazette*, of the 23rd March, contains an announcement of the disallowance of an Act passed by the Legislature of Ontario, on 11th March, 1879, intitled "An Act respecting the administration in the northerly and westerly part of Ontario," on the ground that it was not competent for the Local Legislature to pass such an Act.

The Attorney-General has wisely yielded to the wish generally entertained by the profession, and expressed in this journal, that the new Judicature Act should stand over until next session. It will doubtless then become law, but in the meantime there will be ample time to make suggestions, which we doubt not, will be fully considered and acted upon, if thought desirable.

The rules of the English Judicature Act provide for suing partners in the name of the firm. This is copied into the proposed Canadian Judicature Act, which, we are glad to say, is not yet law. In a late case James, L. J., observed that some difficulty may arise from this provision inasmuch as we have not yet introduced into our law the notion that a firm is a *persona*. If there is a change in the constitution of the firm, so that those who were partners at the time of

EDITORIAL NOTES.

the contract, and E. F. G. at the time of the action, it might be that you could not sue the firm as such: *Ex p. Blain*, 28 W. R. 336.

The Division Court Act brought in by the Government has passed with many amendments—sixty-eight sections in all. The efforts of the "Conservative" Opposition further to subvert the existing order of things was, fortunately, unsuccessful. The Division Court is no longer what it was constituted as—the poor man's court; and the pettifogging peddler has been helped to shove himself one step further into the professional hall-door. The Attorney-General and the learned leaders of the Opposition, together with the Benchers, might as well open it wide and bid him and his conveyancing brother welcome.

The Insolvent Act is no more. The strong feeling evinced against it last session had partly died away this year; but its doom was sealed. We trust it may be an omen of better times. We shall now see how far the Act, prepared by the Attorney-General, will meet the necessities of the case. We have had occasion to say some strong things against Sheriffs, who will be principally concerned in the administration of the new Act; but we are satisfied that nothing could be more unsatisfactory than the reign of official assignees. Creditors will feel now that pleasant sense of relief which comes over the backwoodsmen when the mosquito season is over.

An important case was recently decided in the Supreme Court, which can hardly be considered satisfactory in the result, at least to those who pin their faith to the judges of their own Province. Taking the judgments delivered in the

different courts together, there were seven judges in favour of the defendant's contention, and six in favour of the plaintiff. But these six were all from Ontario, where the case arose—Wilson, Moss, Patterson, Burton, Strong, and Gwynne—a formidable array. The others were—Harrison, Morrison, Galt, Ritchie, Henry, Taschereau and Fournier. He would be a bold man who would lay money against the chance of a reversal if there were a fourth court to go to.

The gossip going the round of the lay newspapers touching the alleged strictures of the Master of the Rolls on the judgments of the Lord Chancellor appears to be quite without foundation. The facts are that a passage was cited from one of Lord Cairns' judgments which was found to be unintelligible, whereupon Sir George Jessel said the judgment could not have been revised by the Chancellor—thereby intending to blame, not the judge, but the reporter. The Master of the Rolls afterwards conferred with the Lord Chancellor, who said he had had occasion to blame the reporter for not submitting some of his judgments to him for revision and that he always revised his decisions when they were sent to him by the reporter.

The last number of the Supreme Court reports (No. 2, vol. 3) is just received. There has been a gradual and marked improvement in these reports since the first number was issued. We have had occasionally to point out mistakes in these as well as other reports, and to urge various suggestions for improvements; but it has been done in no unkind spirit. We know also the difficulties which the publisher, Mr. Cassels, has had to contend with. It is, therefore, the more gratifying to see that these reports, which ought to

THE SUPREME COURT.

be the best in the country, being those of the highest Court, have now assumed an appearance very like the English models. The courteous and energetic registrar of the Court, who is responsible for the publishing, is to be congratulated upon this. We understand that applications and subscriptions for these reports are to be sent to Mr. Cassels direct.

THE SUPREME COURT.

We shall not be accused of speaking evil of dignities, when we refer to the feeling which has arisen against the Supreme Court, inasmuch as expression has been given to it on several occasions in the halls of Parliament itself.

Nor do we refer to these complaints, except so far as a useful purpose would seem to be served by so doing. Some of the matters complained of are things of the past, and some are unworthy of notice in a legal journal. The attempts that have been made to do away with the Supreme Court have come to nothing, and Parliament has unmistakeably pronounced it to be a necessary incident of Confederation. In this state of affairs it is in the interest, both of the profession and of the public, to consider some of the causes which do at the present time, or which may in the future, interfere with its usefulness. If the difficulties thus presenting themselves seem to point to any particular mode in which a change can beneficially be made, it will be for others to take the matter up, and, if possible, apply an appropriate remedy.

Under the most favourable circumstances the Court has much to contend with. Its members are called together from the four quarters of the Dominion; from Provinces having different systems of laws, different legal traditions, different practice, and one of them speaking a different language from the others.

It is not, therefore, much to be wondered at if there is some want of homogeneity in the Court. So long as the same Judges remain together, there may in this be a gradual improvement. But here, again, the Judges are placed at a disadvantage. In Toronto, Montreal, and the capitals of the different Provinces, there are large and strong Bars, and a large and learned Bench; and this is especially so in Toronto, where there are congregated, at Osgoode Hall, no less than nine Judges of Superior Courts, and four Appellate Judges—thirteen in all. It is impossible to estimate, and unnecessary for us to enlarge upon the benefits derivable from assistance and attrition of that kind. In Ottawa, of course, the Judges are deprived almost entirely of this advantage.

A difficulty of much practical importance will from time to time be felt so long as the sittings of the Court are held, and the Judges are compelled to reside at Ottawa; and that is, the difficulty of obtaining for the Supreme Court Bench the best available talent. Men will not, as a rule, break up their establishments, scatter their families, and leave their friends to live in an out-of-the-way, and to them uncongenial place like Ottawa; the only countervailing inducements being a small increase of salary, and a name, which may be much to the few, but little to the many, in comparison to the disadvantages and discomforts. It is unnecessary to dilate upon the results which would flow from an inferiority in point of talent of those composing the Court of last resort. We are not, of course, speaking of those at present on the Bench, but of those who may be appointed after the glamour of the thing has disappeared, and possible recipients of the honour thoroughly understand how much they have to give up and how little they get in return.

THE SUPREME COURT.

We feel bound also to refer to another point which cannot be overlooked, but which we wish to touch upon as lightly as possible, not that any evil *has* resulted, or, we believe, *could* result during the present constitution of the Court as regards its *personnel*. It is, we conceive, contrary to sound policy that any Court which may be called upon to decide questions of Constitutional Law, and to decide Election cases, should live under the shadow of its appointing power. It may be said that this is a purely imaginary evil; but the imagination of such a thing would in itself be a source of evil, and should, if possible, be avoided. It was something of this kind, if we remember correctly, which induced Bismarck to move the Supreme Court of Prussia from any possible influence of this nature. It is, moreover, most wholesome for the Judges themselves (and they will be the first to reiterate these remarks), that they should live in a large rather than in a small city, and be subject to the restraining and beneficial influence of strong public and professional opinion, and surrounded by a large, able and well-trained Bar, and within the precincts, of such a place for example, as Osgoode Hall, replete with the noble traditions of its learned Judges, strong in their integrity and devotion to duty, examples for all time to those who shall occupy judicial positions.

So much for the Court itself and its members. We must also consider the suitors and the Bar. The former have a right to ask the best talent at the Bar to conduct their cases before the Court of final resort, but the circumstance of that Court being at Ottawa is often too strong for them. For example, a suitor in one of the Maritime Provinces would naturally wish to have his case presented by one of the best men there; but this would entail a very heavy expense, so that he is

compelled to employ counsel residing at Ottawa, where the choice is necessarily limited. If the Court were at Toronto instead, he could secure the services of some of the most eminent men in the Dominion for a sum, which, in comparison to bringing counsel from Halifax, &c., would be trifling. In any case, Toronto would be, for all practical purposes, as near to them as Ottawa.

A consideration of these things would seem to point to one conclusion, and that is, the advisability of a removal of the headquarters of the Supreme Court from Ottawa to some more desirable place. Our Quebec friends would naturally prefer to see it in Montreal, but they are far too liberal to allow anything of a dog-in-the-manger policy to influence them, if they are convinced that any change should be made. We understand, moreover, that several eminent men from that Province have already said that if the choice lay between Ottawa and Toronto, they would prefer the latter. Both cities are in the Province of Ontario, and the further distance to Toronto would surely be counterbalanced by the many disadvantages incident to remaining at the present capital of the Dominion.

Our wish, however, at present is not so much to speak of the place where the Court should be placed, but to show some good reasons for a change from its present location. Anything which can, even in a slight degree, affect the well being of this Court must be of interest, not merely to the profession but to the public. We have not by any means exhausted the subject, and have hardly more than touched upon the negative side of the case. But we think we have suggested a few thoughts for the consideration of those who are responsible for the well being of the highest Court of our Dominion.

EVIDENCE OF COLLATERAL MATTERS.

EVIDENCE OF COLLATERAL MATTERS.

It is sometimes a question of nicety, and in jury trials of vast importance, to know when evidence may safely be given of occurrences similar to, but not specifically connected with the matters in issue between the parties. In so far as actions grounded on negligence are concerned, most of the recent authorities are collected and commented on in *Edwards v. The Ottawa River Navigation Company*, 39 U. C. R. 264. The Company in that case was sued for negligence in the construction and management of a steamboat, whereby sparks caused the ignition of the plaintiff's lumber yard. It was contended that the fire was caused by leaving the screens of the funnels open; and it was held not competent for the plaintiff to give evidence that on other occasions at different times and places the screens were open and cinders had escaped. This class of testimony could not assist the jury in coming to the conclusion that the fire in question was thus caused. As a contrast to this case, where the suit was in contract for the recovery of wages, and the dispute was whether the person who hired the plaintiff was the agent of the defendant, it was held proper to prove by persons who worked at the same job with the plaintiff, that they had applied to the defendant for payment, and were paid by him: *Stewart v. Scott*, 27 U. C. R. 27. To the same effect is an older case, in which the facts were that the wife of the defendant took her niece to the plaintiff's school, and while there the defendant visited her. The father of the young lady died while she was at school, but the plaintiff had never had any communication with him. It was held that the jury might consider evidence of tradespeople showing that the defendant had paid for various things

ordered by his wife as evidencing a general recognition by the defendant of his wife's authority to bind him by her acts: *McGeorge v. Egan*, 3 Jur. O. S. 266. It is indeed questionable whether this case, as reported, has not carried the law of evidence a little too far, and this may account for its omission in the ordinary text-books.

Of unexceptionable authority, however, is the late case of *Woodward v. Buchanan*, L. R. 5 Q. B. 285. That was an action for work done and materials supplied to the defendant for houses, on the orders of a third person who it was alleged was the agent of the defendant. The latter denied that he was the owner of the houses, or the real principal. Evidence was received that other workmen had received orders from the defendant directly, to do the work at the same houses, without shewing that the plaintiff knew of these orders at the time he did his work. This line of evidence tended to shew by the conduct of the defendant that he was the owner of the houses in question. So in an action for money lent, the poverty of the alleged lender is a relevant fact to be proved by surrounding circumstances, *Dowling v. Dowling*, 10 Ir. L. R. N. S. 244.

In the last English case, *Blake v. The Albion Life Assurance Society*, 45 L. J. C. P. 663, the point we are dealing with arose first upon an application referred by Amphlett, B., to the full Court, to strike out certain paragraphs of the plaintiff's claim as irrelevant. The action was to recover the amount of a premium upon a policy effected with the defendants. It appeared that one Howard advertised himself as ready to lend money on personal security, and the plaintiff applied for a large loan. Howard required him to insure with the defendants and to deposit the policy as a security. This was done, but then Howard

declined to advance the money on various frivolous pretexts, and it was alleged that the defendants had paid over half the premium to Howard. The paragraphs complained of stated that in various other instances the defendants and Howard had pursued a similar course. The clauses were struck out as being not relevant. Coleridge, C. J., observed, "I am of opinion that they contain statements which are not evidence even in chief. It is in effect saying that there is fraud here, because there has been fraud in other cases." Brett J. took the same view, and said further, "they may be facts which, upon a cross-examination, might be brought out in order to damage the credit of the defendants or their witnesses." Lindley, J., hesitated as to the matters being evidence (see S.C. 24 W. R. p. 677). These learned Judges, however, must have reconsidered their views, because when the trial came on before Lord Coleridge he admitted evidence in chief of the other examinations, as tending to prove a system of fraud (L. R. 4. C.P.D. 97). During the argument for a new trial he said, "if our observations previously made were in effect only that you cannot prove one offence by merely proving another they are right. If they convey the idea that to complete the chain of proof in a case of fraud, other like frauds of the same offenders cannot be shewn by the evidence, our ruling was wrong and I will not be bound by it" (ib. 99).

The plaintiff's case was that there was an agreement between Howard and the defendant in order to defraud persons in the plaintiff's position, and, in support of this, evidence was given shewing that a number of other persons in consequence of similar advertisements had been induced to invest with the Company, and that, in each case, there had been a failure to get the money under circumstances

exactly the same as those of the plaintiff's case, and that the same Howard had figured in these various transactions under different aliases. This kind of evidence was by all the judges in *Banc* held admissible. Mr. Justice Lindley put it on the ground that the various frauds formed part of a systematic series of fraudulent transactions. "If it can be shewn," he said, "that the fraud is one of a class having common features, I am of opinion that the evidence of the other frauds is admissible. The common feature in the present case is the false pretence." Mr. Justice Grove said that "the evidence was well received, because in many cases you can only prove fraud by showing what is behind: the question being one of intention, showing the intention, the motive or the design is the only way of showing the fraud. If this could not be done, fraud could often not be proved in cases where it exists." The Chief Justice agreed with both views, and said further, that the various transactions were not *res inter alios acta*, but necessary links in the chain of the plaintiff's proof.

DIVISION COURT CLERKS AND BAILIFFS.

We give the following remarks by a County Judge in answer to a letter to him, complaining of the neglect of a clerk in collecting money on a claim placed in his hands for suit. It may serve to show that clerks and bailiffs are often complained of in an unreasonable manner. After dealing with the particular complaint, the learned Judge thus speaks:—

You remark that you hope a better system will be established for the collecting of debts throughout the county than the present mode, as carried out by the Division Court Act. I have no doubt that there are instances of neglect on the part of clerks and bailiffs of Division Courts. But I be-

DIVISION COURT CLERKS AND BAILIFFS.

lieve that those instances are fewer in number than is generally supposed. There is a very common disposition to attribute neglect to these officials, merely because the money is not forthcoming. Now, pray, look for a moment at the difficulties they have to encounter. A judgment has been obtained, and execution has issued against a person of doubtful solvency. The bailiff seizes; a claim is made by some third party to the goods. If the bailiff interpleads, and the case goes against the plaintiff, then he blames the clerk and bailiff, for not having known better than to lead him into such trouble and costs. If the bailiff is indemnified by the plaintiff, and proceeds to sell, he may have to stand as the defendant in an action, and should he be defeated, and the plaintiff called upon to indemnify him for the costs, here is another cause of complaint. The clerk and the bailiff, it is perhaps said, are playing into each other's hands, and perhaps into the hands of the successful claimant, or of the debtor. If the plaintiff declines to act either one way or the other, and the matter stands still, then the clerk is blamed for neglect. If he does not enter into a full correspondence on the subject, he is also blamed, although there is no pecuniary allowance made to him, even if he were to write a dozen letters on the subject. Then again, suppose the bailiff does proceed to sell—very likely there is an understanding amongst the bystanders that no one shall bid beyond a trifle, so that the goods may be bought in by the friend of the debtor, and thus only a portion of the amount is realized. These difficulties and many others are almost entirely in the case of debtors who are scarcely solvent—and in some cases are really insolvent—where the debtors are in good circumstances they pay the demands against them without trouble. But it is too much the custom by entreaty, promises and representations to induce people to buy goods who ought not to have had credit. These people are sure to cause trouble when the collecting has to be done. Sometimes they try to shield themselves from paying by setting up that the goods sold were of a miserably shoddy description, and that they were deceived, and induced to give a note by false representations. If this defence should prove unavailing, then an effort is made to defeat the execution. Of course there are, unfortunately, instances where debtors who have no cause of complaint, will nevertheless do this in order to avoid payment. In this state of things it is well to remember that the clerks and bailiffs in the rural parts have no attorney to apply to, as the sheriff of a county may do. In such cases, when there is a difficulty in the way, the sheriff can always communicate with the creditor's attorney, and act accordingly. But with the clerk and bailiff there is no such refuge; neither of these can get advice from an attorney unless he pays

for it out of his own pocket. If he corresponds with the creditor on the subject, he must do it gratuitously, for he is allowed nothing for letters written by him on such a subject. And if he were to do so, in all probability the creditor would pronounce him to be a very troublesome person. I see no remedy for this state of things other than this, namely: that credit should not be given to persons whose solvency is doubtful. It is a vain and useless thing to cry out about bailiffs and clerks not immediately making the money from people of this kind—depend upon it, the remedy is to be found deeper than with clerks and bailiffs. I repeat that there may be, and doubtless are, instances where they are remiss in their duties. All I ask for is some forbearance and some consideration of the difficulties which surround them.'

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

From Q. B.]

[March 2.

MITCHELL v. GOODALL.

Equitable assignment.

By the terms of a deed of surrender, a farm reverted to the plaintiff with the fall wheat sown, and the tenant one W. was to have the privilege of reaping the wheat he had sown or selling it by paying rent up to a certain date, in advance, or securing it by the 1st of October, 1878. When that date arrived without payment being made or security given, the plaintiff refused to allow the removal of the wheat. Thereupon W. offered to give him an order on the defendant, a commission merchant, to whom he was accustomed to send his grain for sale, if the defendant would accept the order. The plaintiff accordingly saw the defendant, when W., in defendant's presence, signed the order in the plaintiff's favour, which defendant said he would pay as soon as he realized on the grain. There was conflicting evidence as to whether the plaintiff did or did not tell defendant that unless he got the order he would not let the grain go. The grain was then shipped to the defendant, who sold it and passed the

C. of A.]

NOTES OF CASES.

[C. of A.]

proceeds to W., who instructed him not to pay the order in plaintiff's favour.

Held, affirming the judgment of the Queen's Bench, that the plaintiff was entitled to recover, as what was done clearly constituted an equitable assignment of the wheat.

McMichael, Q. C., for appellant.

Rose, for respondent.

Appeal dismissed.

From Proudfoot, V. C.] [March 2, 1880.

MORTON V. NIHAN ET AL.

Insolvent Act of 1875—Fraudulent mortgage—Evidence—Burden of proof.

This was a bill filed by the assignee in insolvency of one T. to set aside a mortgage given by him shortly before his insolvency to the defendants as fraudulent and void; the alleged consideration being an advance of \$2,000.

Held, reversing the decree of Proudfoot, V.C., that under the suspicious circumstances which surrounded this case the *onus* was wholly upon the defendants, to prove not only that a debt existed, but that the money received by T. in payment thereof had been honestly advanced to him on the faith of the impeached mortgage, which the evidence entirely failed to establish.

W. Cassels for the appellants.

MacIennan, Q.C., for the respondents.

Appeal allowed.

From Q. B.]

[March 2.

NASMITH V. MANNING.

R. W. Co.—Action by creditor against shareholder—Proof of defendant being a shareholder—Allotment.

Held, reversing the judgment of the Queen's Bench, Moss C. J. A. dissenting, that the evidence was not sufficient to prove notice of the allotment of the shares to the defendant.

Ferguson, Q. C., for the appellant.

McMahon, Q.C., and *Proctor*, for the respondent.

Appeal allowed.

From Spragge, C.]

[March 2.

GRIFFITH V. BROWN.

Statute of Limitations.

In order to obtain convenient access to the upper rooms of their house, the plaintiffs constructed a wooden platform and stairway on the outside of the house, on the defendant's land. This structure was composed of planks laid upon blocks or scantling resting upon the ground, but the platform at the head of the stairs leading from this pathway rested upon posts more firmly affixed to the freehold. The platform and stairway were open to every one, including the defendant, and there was no bar or gate to prevent defendant from entering on his property. The defendant did not take any proceedings against the plaintiff, or make any protest against him for more than ten years.

Held, reversing the decree of SPRAGGE, C., that the plaintiffs had not such exclusive possession of the land covered by the structure as by force of the Statute of Limitations to vest in them a title in fee simple, and that even if the Statute had commenced to run, it was stopped by the fact that during the ten years the defendant had, for the purpose of carrying out some works on his own premises, temporarily taken up the platform, and removed a portion of the stoneway.

W. Cassels for the appellant.

Robinson, Q. C., and *G. Cox* for the respondent.

Appeal allowed.

From Proudfoot, V. C.]

[March 2.

THE CANADA FIRE AND MARINE INSURANCE COMPANY V. THE WESTERN INSURANCE COMPANY.

Marine Insurance—Re-insurance.

The bill was filed to recover back money paid under a mistake of fact. It appeared that one B., was the agent in Montreal of the Western Insurance Company and the Canada Fire Insurance Company. He accepted a risk on a vessel of \$7,700 for the Western Insurance Company, but as the limit prescribed by that Company for risks on any one

C. of A.]

NOTES OF CASES.

[Q. B.]

vessel was \$5,000, it became necessary for him to effect a re-insurance, and he immediately directed his clerk to write a memorandum of application and acceptance on the books of the Canada Fire and Marine Insurance Company for a re-insurance for \$2,700, which was done, but the clerk whose duty it was to endorse the particulars on the open policy, prepare the certificate, and report the transaction in the daily return, unintentionally omitted to do so, and no notice of the re-insurance was given to the re-insuring company until after the loss occurred.

Held, affirming the decree of PROUD-FOOT, V. C., that the defendants were not liable, as the application and acceptance of the risk were, under the circumstances, sufficient to make a binding contract of re-insurance.

Appeal dismissed.

From C. C. Simcoe.]

[March 2

BARRIE GAS COMPANY V. SULLIVAN.

Contract.

The defendant contracted with the plaintiffs to sink an artesian well at seventy-five cents a foot. Having sunk a distance of one hundred and sixty feet, an impediment occurred, and defendant refused to proceed with the work.

Held, that he was entitled to be paid for the work done, as the evidence did not show that he agreed that he should receive nothing unless he succeeded in finding water.

Pepler for the appellant.

McMichael, Q. C., for the respondent.

Appeal allowed.

From Q. B. and C. P.]

[March 3.

WRIGHT V. SUN MUTUAL INSURANCE CO.

Insurance Policy—Want of seal—Estoppel—Departure.

The policy sued on in this case was issued by the Company without the corporate seal being affixed, although the attestation clause stated that the Company had thereunto affixed its seal. The Act of Incorporation of the Company provided that "all policies

..... shall be signed, and being so signed and countersigned, and under the seal of the Company, shall be deemed valid and binding upon them." *Held* affirming the judgments of the Queen's Bench and Common Pleas, that the policy was a valid insurance contract notwithstanding the absence of the seal. The declaration was on a policy of insurance and to the plea of "*non est factum*," the plaintiff replied, setting out that the policy was issued and acted upon by all parties as a valid policy, and that the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it. *Held* a good replication, and not a departure from the declaration.

Bethune, Q. C., for appellant.

H. J. Scott, for respondent.

WRIGHT V. LONDON LIFE INSURANCE CO.

This case was similar to the preceding, except that the statute incorporating the Company provided that "no contract shall be valid unless made under the seal of the Company, and signed except the interim receipt of the Company." *Held*, that the policy was, nevertheless, binding, and (*per* PATTERSON, J.) would be construed if necessary, as an interim receipt.

Bethune, Q. C., for appellant.

H. J. Scott, for respondent.

QUEEN'S BENCH.

IN BANCO—HILARY TERM.

CANADIAN BANK OF COMMERCE V. GREEN
ET AL.

Principal and surety—Negligence of creditor—Discharge of surety.

Defendants were maker and endorser respectively of a promissory note for the accommodation of D., who discounted it with the plaintiffs, they having knowledge of the facts.

On the maturity of the note plaintiffs handed it to D., who was their solicitor, for

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protest. D. did not protest or notify defendants of its dishonour, but delivered it to them, adding that he had paid it. About three months after its maturity D. absconded in insolvent circumstances, and after that defendants were for the first time notified of the non-payment of the note.

In an action against defendants on the note they pleaded, on equitable grounds, the above facts and that, by the laches of the plaintiffs, they were prevented from obtaining indemnity from D., and that if compelled to pay the note, they would be defrauded out of the amount.

Held, a good defence, and that the defendants were discharged.

IN RE BROCK AND THE CORPORATION OF THE
CITY OF TORONTO.

*Assessment for sewers — Statutes — Revised
Statutes—Repeal—Construction.*

Sec. 464, sub-sec. 2, of 36 Vict. c. 48, enacts that the council of every city, town, and incorporated village, shall have power to pass by-laws for assessing upon the real property to be immediately benefited by the making, &c., of any common sewer, &c., "on the petition of at least two-thirds in number and one-half in value of the owners of such real property, a special rate," &c. This sub-sec. is amended, so far as the same relates to the City of Toronto, by 40 Vict. c. 39, sec. 2, by inserting after the words "owners of such real property" the words "or where the same is in the opinion of the said council necessary for sanitary or drainage purposes." 40 Vict. c. 6, respecting the Revised Statutes, passed in the same Session, repealed 36 Vict. c. 48; and R. S. O. c. 74, sec. 551, sub-sec. 2, corresponds with the repealed sec. 464, sub-sec. 2.

Held, ARMOUR, J., doubting and CAMERON, J., dissenting, 1. That under 40 Vict. c. 6, sec. 10, the R. S. O. was substituted for the repealed Acts, and the amending Act was applied to the R. S. O. c. 174. 2. The amendment in 40 Vict. ch. 39, was a reference in a former Act remaining in force to an enactment repealed, and so a reference to the enactment in the Revised Statutes,

corresponding to the sec. 464, sub-sec. 2, within sec. 11 of 40 Vict. c. 6. 3. That the City of Toronto, therefore, could pass a by-law in 1879 to construct a sewer, when necessary in their opinion for sanitary or drainage purposes, without any petition therefor.

MYKEL V. DOYLE.

Easement—Obstruction—Limitation—R. S. O., c. 108.

Held, ARMOUR, J., dissenting, that the Ontario Act (R. S. O., c. 108), reducing the period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way, in *alieno solo*, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction.

SULLIVAN V. THE CORPORATION OF THE
TOWN OF BARRIE.

*Municipal Corporations—Defective drainage
—R. S. O., c. 174, sec. 491—Limitation
of action.*

To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town, whereby the drains were choked and the sewage matter overflowed into the plaintiffs' premises, defendants pleaded that the cause of action did not accrue within three months: *Held*, bad, as sec. 491 of the Municipal Act, R. S. O., c. 174, did not apply.

COSGRAVE ET AL. V. BOYLE, EXECUTOR OF
JAMES STEWART.

*Promissory note—Death of endorser—Notice
of dishonour.*

S. endorsed a note to the plaintiffs for the accommodation of the maker, and the plaintiffs discounted it at a bank. S. died before it fell due, and at its maturity on the 8th of March, 1879, it was protested at the bank for non-payment, where the death of S. was unknown, and notice was sent addressed to S. at the place where the note was dated. The defendant, executor of

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S., proved the will in January, and the plaintiffs, who knew of the death of S., had written to his son three days before maturity, calling his attention to the note. The plaintiffs having taken it up and sued defendant,

Held, that the notice was insufficient, ARMOUR, J., dissenting.

DUNLOP V. THE CANADA CENTRAL RAILWAY COMPANY.

R. W.'s and R. W. Co.'s—Deed by part owner of land—Infants' interest barred—31 Vict. ch. 68, D.

The mother of infant children, resident with her, being entitled to a third undivided interest in the land, they owning the residue, by deed agreed with a railway company, in consideration of an extension by them of their line of railway from R. to P., and for \$1, to grant to them in fee the right of way "through my land in P., consisting of such portion of lots 18 and 19 as may be required to carry the railway across said lots," and conveyed to them accordingly. At the time of the conveyance she had not been appointed guardian to her children: *Held*, that under the Railway Act of 1868 (31 Vict. c. 68, sec. 9, sub-secs. 3, 9, D.), her deed barred the children's interest in the land as well as her own, and that they were not therefore entitled to compensation from the company.

VACATION COURT.

Cameron, J.] [March 23.
IN RE CORPORATION ALBERMARLE AND CORPORATION, EASTNOR, LINDSAY AND ST. EDMONDS.

Separation of Municipalities—Apportionment of assets and liabilities.

Held 1. That on the separation of united townships, arbitrators appointed to apportion assets and liabilities may consider receipts and expenditures during the union, and are not restricted to a mere division of assets, with set off of liabilities. 2. Under the facts of this case the arbitrators had improperly distributed the Municipal Loan Fund moneys.

Observations on the duties of arbitrators in such cases, and the mode of procedure.

Bethune, Q. C., for applicants.

H. J. Scott, contra.

Cameron J.] [Feb. 24.

IN RE COUNTRYMAN V. EDWARDSBURGH.

Municipal Corporations—Stopping up original road allowance—By-law—R. S. O. ch. 174.

It is not for the Court to consider the balance of convenience or inconvenience that may arise from the passing of a by-law for closing an original road allowance, if passed after the observance of the preliminary requisites prescribed by the Municipal Institutions Act (R. S. O. ch. 174).

A Township Council has power, under the above Act, to pass a by-law merely for the stopping up of an original road allowance, and is not restricted to the passing of a by-law for stopping up the allowance for the purpose of sale.

Rose for applicant.

Watson, contra.

Osler J.] [Feb. 27.

IN RE LANGDON AND THE TOWNSHIP OF ARTHUR.

Railway—Bribery—Refusal of Council to pass by-law—Mandamus.

Where a by-law granting a bonus to a railway has been carried by the electors, a Municipal Council may refuse finally to pass the same in consequence of its passage having been procured by bribery, and may set up such bribery in answer to an application for a mandamus.

Observations as to how far bribery must be proved in a case of the kind.

J. K. Kerr, Q. C., for applicant.

H. J. Scott, for Township.

Cameron J.] [March 2.

CANADIAN BANK OF COMMERCE V. GREEN ET AL.

Principal and surety—Negligence of creditors—Change of surety.

Defendants were makers and endorsers.

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respectively, of a promissory note for the accommodation of D. who discounted the same with plaintiffs, they having knowledge of the facts.

On the making of the note, plaintiffs handed it to D. who was their solicitor, for protest. D. did not protest or notify defendants of its dishonour, but delivered the note to them, alleging that he had paid it. About three months afterwards D. absconded in insolvent circumstances, and defendants were then, for the first time, notified of the non-payment of the note.

In an action against defendants upon the note, they pleaded, on equitable grounds, the above facts, and that by the laches of the plaintiffs they were prevented from obtaining indemnity from D., and that, if compelled to pay the note, they would be defrauded out of the amount.

Held, a good defence, and that the defendants were discharged.

Creelman for the demurrer.

Spencer, contra.

Galt, J.]

[March 12.]

REGINA V. DAVIDSON ET AL.

Trespass to land—32-33 Vict., c. 22, sec. 60
—*Title to land*—*Quashing conviction*.

Where the defendants had been convicted, under 32-33 Vict., c. 22, sec. 60, of trespass to land, and it appeared that there was a dispute between the parties as to the ownership.

Held, that it was a case in which the title to land came in question, and that defendants had been improperly convicted, even though the magistrate did not believe that they had any title to the land in question, it not being within his power to decide on the title, but merely on the good faith of the parties alleging it.

J. K. Kerr, Q.C., for prosecutor.

C. Robinson, Q.C., contra.

COMMON PLEAS.

VACATION COURT.

Cameron J.]

[February 20]

ATWOOD V. ROSSER.

Magistrates—Action for not making immediate return of conviction—Pleading.

To an action against two Justices of the Peace, for not making an immediate return, in writing, of a conviction made by them against defendant, for swearing profanely, &c., the defendants pleaded that they duly made the return of the said conviction required by law to be made by them to the Clerk of the Peace.

Held, on demurrer, by CAMERON, J., plea bad.

Bartram for the plaintiff.

MacLennan, Q. C., for the defendants.

Cameron J.]

[March 2.]

GRAND JUNCTION RAILWAY COMPANY V. POPE.

Principal and surety—Guarantee—Pleading.

Action against defendants as sureties for the due performance, by one B., of a contract made by him with the plaintiffs, for building a railway, &c., from Belleville to Lindsay, and providing the requisite land, &c., therefor, alleging the failure to build said railway. Fifth plea: that plaintiffs mortgaged and otherwise incumbered the said roadway. *Held* bad, as not showing how the said incumbrance said in any way prejudiced the principal in the performance of the contract.

Sixth plea: that plaintiffs altered the conditions of the contract by allotting to the principal a large quantity of stock in the company, and thereby released defendants. *Held*, also, bad, in not showing how the allotment altered the contract.

Ninth plea: that the plaintiffs sustained no loss or damage by B.'s default. *Held* bad, for that the defendant's contract was not merely one of indemnity, but also guaranteed the performance by B. of certain specified acts.

Tenth plea: alleging that the contract

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was executed after breach. *Held* bad, as being no answer to causes of action created by the breaches alleged.

Appelle for plaintiff.

Robinson, Q. C., for defendants.

Cameron J.]

[March 2

SMITH v. BURN.

Assignment of judgment debt—Surety—Statute of Limitations.

Held, that an assignment of a judgment to a trustee for one of the defendants, who was a surety for another of the defendants, made six years after the surety had paid the judgment to the judgment creditor, could be validly made, although the surety's direct cause of action against the principal and co-judgment debtor had been barred by the Statute of Limitations.

J. K. Kerr, Q.C., for the plaintiff.

Appelle, for the defendant.

IN BANCO.

MARCH 5.

CRANDELL v. CRANDELL.

Malicious arrest—Proof of warrant and information—Date of acquittal—Proof of—Statute of Limitations—Evidence—Excessive damages.

The first count of the declaration alleged that one K falsely and maliciously, and without reasonable or probable cause, issued a warrant against plaintiff on a charge of fraud, and obtaining money under false pretences, and that defendant falsely and maliciously, and without reasonable or probable cause, prosecuted same, and caused plaintiff to be arrested and imprisoned, alleging the trial and the acquittal of the plaintiff and the termination of its proceedings. The second count alleged that the defendant falsely, and maliciously, &c., caused plaintiff to be indicted on said charge, and to be tried therein, alleging his acquittal, &c.

Held that, under the first count, the warrant under which plaintiff was arrested should have been proved, or sufficient evidence of a search therefor and its loss, to enable evidence of its contents to be given; but as evidence of such contents was given

at the trial without objection, an objection taken in the rule nisi was too late. A similar objection taken in the rule nisi as to proof of the information, even if such proof were necessary, was for the same reason, also held to be too late.

Held that, under the second count, proof of such documents was not necessary.

Held, also, that plaintiff was not bound by the day stated in the record of acquittal, but might show as a matter of fact the actual day on which the acquittal took place.

Held, also, that the Statute of Limitations commenced to run from the date of acquittal, when the proceedings were terminated, and not from the date of arrest.

Held, also, that the evidence, set out in the case was sufficient to connect the defendant until the arrest and prosecution of the plaintiff.

The Court was of opinion that the damages found for the plaintiff, \$3,000, were excessive, and directed, subject to plaintiff's acceptance, that they should be reduced to \$1,000, but if defendant paid \$500 and the costs of the action, before 1st June next, the amount should be reduced to that sum; but if plaintiff refused to accept this there should be a new trial on payment of costs by the defendant.

Bigelow, for the plaintiff.

MacLennan, Q.C., for the defendant.

ANCHOR INSURANCE CO. v. PHENIX INSURANCE CO.

Marine insurance—Total loss of freight—Action for.

The owner of a vessel called the "St. Andrews" had insured his vessel with defendants on a voyage from Toledo, U. S., to Kingston, Ont., and had effected another insurance with them on its freight. The vessel met with an accident in the Welland Canal, near Port Colborne, and sank. The cargo was damaged, and the owner of it had abandoned it to the plaintiffs. The plaintiffs' agent being of opinion that it was better to take possession of the cargo where it was, and send it to Buffalo, in place of having it forwarded to Kingston, applied to the owner to give plaintiffs possession of the car-

go, offering to pay him one-half of its freight *pro rata itineris*, but to this defendants objected, unless the owner would exonerate them from any claim under their policy. Under these circumstances, an arrangement was made between the owner and the plaintiffs, whereby he assigned to them the freight policy, and gave them possession of the cargo, and they paid him the full freight. The cargo was then taken to Buffalo and there sold by the plaintiffs. The plaintiffs contend that, under the circumstances, as it would have been impossible to have taken the cargo to Kingston, there was in truth a total loss of freight, and that they were, therefore, entitled to recover therefrom against the defendants.

Held, Wilson, C. J., dissenting, that the plaintiffs were not entitled to recover.

MacLennan, Q. C., for the plaintiffs.

Robinson, Q. C., for the defendants.

SMITH V. GORDON.

Work and labour—Architect's certificate—Necessity for—Wrongful dismissal—Added count.

In an action on the common counts for work and labour, the plaintiff was held disentitled to recover, by reason of his not having procured the certificate of the architect in charge of the work, of the work having been done to his satisfaction, which was rendered necessary by the terms of the contract.

An amendment, however, was made in term, adding a count for an improper and wrongful dismissal of the plaintiff, whereby he was prevented from completing the contract, and from obtaining the architect's certificate for the work already done by him at the time of dismissal; and as all the evidence which could be given in relation thereto had already been given under a plea setting up, as an answer to the action, the dismissal under a supposed right or power conferred by the contract, which evidence clearly showed that the plaintiff was entitled to recover, a verdict, therefore, on such added count was entered for the plaintiff.

Ferguson, Q. C., for the plaintiff.

J. E. McDougall for the defendant.

BANK OF COMMERCE V. GURLEY.

Promissory note—Illegal consideration—Bona fide and for value as collateral security for antecedent debt—Right to recover.

Held, that an antecedent debt is a good consideration for a note transferred as collateral security for the debt, so as to enable a *bona fide* holder without notice to enforce it, though void for illegality as between the maker and payee.

Ferguson, Q. C., for the plaintiff.

Ritchie, for the defendant.

LONG V. ANDERSON.

Patent from Crown—Construction of—Fee simple.

By a patent from the Crown to one J. L., widow, after reciting that she had contracted with the Crown Lands Department for the absolute purchase of the land at a price specified, the land, in consideration of the payment of said sum, was granted to the said J. L., upon the condition "below stated. . . To have and to hold to the said J. L., for the use and benefit of herself and children, Margaret, Robert, and Henry L., their heirs and assigns for ever; and also to have and to hold the said parcel or tract of land hereby granted," &c., "unto the said J. L., upon the condition above stated, her heirs and assigns forever."

Held, that in order to carry out the contention of the Crown, the habendums must be transposed, and the second read as the first, and so reading them, J. L., as the grantor of the use first declared, took, under the Statute of Uses, a fee simple in the land.

Meredith, for the plaintiff.

Bethune, Q. C., for the defendant.

DOMINION BANK V. BLAIR.

Bond—False representation—Evidence.

Action on a bond against defendants as sureties for one F. The bond was a continuing guarantee until countermanded by notice in writing, by its sureties to the bank. The defence set up by the defend-

ants, who it appeared had never read over the bond, was that they were induced to execute it by the false and fraudulent representations of the defendants' agent, that the bond was merely a renewal, for a year, of a former bond for a year, to which the same defendants were parties.

Held, that there was no evidence to show any such misrepresentation as alleged, and that the defendants were therefore liable on the bond.

Robinson, Q. C., and *McMichael, Q. C.*, for the plaintiffs.

Hector Cameron, Q. C., and *Farewell* for the defendants.

HARRIS V. PRENTISS.

PRENTISS V. PECK.

Tenancy in common—Possession—Notice.

Where one tenant in common of certain lands, without any authority from his co-tenants, usurped their rights by giving leases of the land to trespassers in possession, and on the termination of such leases, the lessees continued in adverse possession of the land for the necessary statutory period.

Held, that under 4 Wm. IV. c. 1, s. 24, a good possessory title was acquired.

Held, also, that notice of persons being in possession of land, to a husband seized thereof, in right of his wife, is notice to the wife.

Bethune, Q. C., for the plaintiff.

Wallbridge, Q. C., for the defendant.

SMYTH V. MORTON.

Insolvency—Act of 1875, sec. 123.

G. & C., a manufacturing firm, being unable to meet a note given to plaintiff in the course of their business, at the plaintiff's request, gave him a chattel mortgage for \$1,500 and interest, on certain machinery and tools in their manufactory, payable in eleven months, the mortgage containing a covenant by the mortgagor to insure against fire, and on demand to assign the policy to the plaintiff. No insurance was effected after the mortgage was executed, and shortly there

after the property was destroyed by fire. The mortgagor, however, held an insurance in the Waterloo County Mutual Insurance Company which was not on the property in question, but on the building. Some days after the fire G. & C., the mortgagors, with the knowledge that they were in insolvent circumstances, and within thirty days of being declared insolvent, gave the plaintiff an order on this Company for a certain amount of money.

Held, that the order was void, under the 133rd section of the Insolvent Act of 1875.

Bethune, Q. C., for the plaintiff.

McClive, for the defendant.

HOPE ET AL. V. FERRIS.

Principal and agent—Proof of agency—Partnership—Money demand.

The plaintiffs and several others, including one W., were tenants in common of certain lands in Pennsylvania, on which an oil well was sunk. In 1875, W. conveyed his interest to the defendant, by way of mortgage for a loan, and defendant received from time to time, through plaintiffs, the amount of W.'s share in the proceeds of the sale of oil. The plaintiffs, who were managing the business, at the request, as they alleged, of the several owners, incurred heavy liabilities in sinking new wells, and this action was brought to recover the proportion thereof claimed to be payable by defendant, the plaintiffs claiming that they acted as defendant's agents.

Held, that the evidence failed to establish the agency relied upon; that the defendant, by the receipt as mortgagee of the proceeds of the sale of oil, did not assume any liability which W. was under to plaintiffs; and even if she did, she would be in the position of a partner, and entitled, before an action would lie against her, to have the partnership accounts taken, and a balance ascertained or admitted to be due.

Held, also, that plaintiff's claim was not a claim for money, under the A. J. Act, so as to be recoverable at law.

McCarthy, Q. C., for the plaintiff.

Bethune, Q. C., for defendant.

WILSON V. HUME.

Master and servant—Hiring servants—Delegated authority—Liability of master.

In an action against defendants, the owners of a vessel, for employing incompetent sailors, whereby an accident happened to the plaintiff, the mate, it appeared that the duty of hiring the sailors had been delegated by the owners to the captain, and that, in accordance therewith, he had hired the men in question.

Held, that the defendants were not liable.

J. Reeve for the plaintiff.

McCarthy Q. C., and E. D. Armour, for the defendants.

BALLANTYNE V. WATSON.

Sale of goods—Proof of contract—Parol evidence—Time—Damages.

Where a contract is to be made out from letters and telegrams, it is not essential that each should refer in terms to the preceding one, but the contract may be made out even from the subject matter of the correspondence, so long as it appears that it all relates to the same contract.

In an action for breach of contract for not delivering 700 boxes of cheese, *held*, that from the telegrams and letters, set up in the case, read in the light of the parol evidence and surrounding circumstances, a valid contract was proved.

It was objected by the defendant that the contract was indefinite as to the price mentioned, 6c., whether per lb. or per box; but *held*, that the evidence showed that the cheese was always put up in boxes, and at a rate per lb., and that the price in this case was, therefore, per lb.

Held, also, that even although by the terms of the contract the plaintiff bought subject to inspection, this was principally for the purchaser's protection, and that he might, as was done here, dispense with it.

A further objection was, that the defendant was merely acting as agent of several certain cheese factories; but *held* that even if so, the defendant, by the contract, contracted in his own name without any qualification, and was therefore personally lia-

ble; and that an equitable defence setting up that the real agreement of the parties was that defendant was merely acting as such agent, and that the plaintiff was inequitably taking advantage of a mistake in the written contract, was not proved.

A further objection was, that time was the essence of the contract, but *held* that the evidence disproved this, and at all events it was waived; and further, that by the contract the delivery was to be within the usual time, which the evidence showed was from ten to thirty days, and that plaintiff proved a readiness within that time.

Held, also, that in the absence of any joint contract by plaintiff with the several cheese factories, the plaintiff, by proceeding against one of the factories for the amount they had to deliver, and settling with them, did not preclude himself from now suing defendant for damages for the residue of the cheese not delivered.

Held, also, that the fact of plaintiff having contracted to re-sell to a third person would not limit his damages to the price agreed upon on such re-sale; but that he was entitled to the market price.

Robinson, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

COLEMAN V. ROBERTSON.

Deed—Description—To water's edge at low water mark—Ad medium filum aque—Possession.

In a deed of land, the description was as follows: "Commencing on the verge of the River Moira, at low water mark," and then after stating the first two courses, stated the third course to be, "to the water's edge of the said river at low water mark," and concluded, "and thence down with the winding of said river to the place of beginning."

Held, that the particular limitation must be construed as specifically stated, and therefore the grant could not be deemed to extend *ad medium filum aque*.

In this case, the defendant claiming under such particular limitations was therefore *held* not entitled to land between the

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water's edge and the *medium filum aque*. A title by possession set up by him was also decided against him.

Wallbridge, Q. C., for the plaintiff.
Bethune, Q. C., for the defendant.

COMMON LAW CHAMBERS.

Mr. Dalton, Q. C.] [February 28.

CLARK V. FARRELL.

Interpleader—Sheriff—Laches.

At the instance of a Sheriff an interpleader order was granted, and issues tried to determine the rights of certain claimants to goods seized by him in execution. Previously to the order being granted, the landlord of the premises laid claim to the goods, which claim the Sheriff did not mention when applying for the order.

Held, that, after the trial of the issue, the Sheriff was not entitled to a second interpleader to test the landlord's claim, as this should have been disposed of on the first application.

Aylesworth, for Sheriff.
Crickmore and *Ogden*, for claimants.
Clarke, for landlord.

Cameron, J.] [February 28.

WHEATLEY V. SHARPE.

Arrest under ca. sa.—Indigent debtor—Allowance—Clerk of Crown, jurisdiction of.

In an action for seduction, the defendant was arrested under a *ca. re*. Judgment having been entered against him, a *ca. sa.* was issued, and defendant was surrendered by his bail to the custody of the Sheriff.

Held, that the defendant was not in custody as a debtor or on execution, but on *meine* process as a wrong doer, and that he was not entitled to an order for weekly allowance under the Indigent Debtors' Act, R. S. O. c. 69.

Held, that it is within the power of the Clerk of the Crown in Chambers to make an order for the payment of a weekly allowance to a debtor, under the above Act, when it can legally be made.

Richards, Q. C., for plaintiff.
Aylesworth, for defendant Wallace.

Hagarty, C. J.]

[March 2.

IN RE HOLLAND V. WALLACE, ET AL.

Division Court—Garnishee—Jurisdiction—Prohibition.

A plaintiff in a Division Court proceeding against a primary debtor and garnishee, in a Court which would not have jurisdiction against the primary debtor alone, must run the risk of proving a garnishable debt in the hands of the garnishee; otherwise a prohibition will lie.

A garnishee is not a defendant within the meaning of R. S. O. c. 47, sec. 62, so as to give jurisdiction to a Court where none exists against the primary debtor alone.

Thorne, for plaintiff.

Cameron, Q. C., for defendant.

Osler, J.]

[March 12.

REGINA EX REL. McDONALD V. ANDERSON.

Quo warranto—Regularity—Elections—Rule 1 M. T. 14 Vict.

A writ of *quo warranto* to test an election was directed to issue by a County Judge during Hilary Term. Respondent applied to have the writ set aside, on the ground that under Rule 1, M. T. 14 Vict. the *fiat* for the writ could in term time be made only by rule of one of the Courts of Queen's Bench or Common Pleas.

Held, that the writ was properly issued, and that the above rule has by subsequent statutory enactments become inoperative.

Holman, for relator.

Aylesworth, for respondent.

Galt, J.]

[March 16.

IMPERIAL BANK V. DICKEY.

Judgment debtor—Service of order—Exhibiting original.

In proceeding against a judgment debtor under R. S. O. c. 50, sec. 305, for breach of an order to examine him, to entitle the plaintiff to a *ca. sa.*, it is not necessary in serving the order to examine to exhibit the original to the defendant, unless demanded by him.

Shepley, for plaintiff.

Holman, contra.

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CHANCERY CHAMBERS.

Proudfoot, V.C.] [Feb. 9.]

RE JOHN RANDALL.

Lunacy.

This was an application to declare John Randall a lunatic.

The motion was ordered to stand over, in order that further medical testimony might be produced.

This could not be obtained, and *Winchester*, for petitioner, asked for an order dismissing the petition.

PROUDFOOT, V.C., declined to make such an order, declaring that the Court did not see fit to make any order on the application.

Proudfoot, V.C.] [Feb. 12.]

TRUST & LOAN COMPANY V. KIRK.

A mortgage suit. Interest payable half-yearly in advance. Bill filed by mortgagees for sale. In taking the account of what was due the plaintiffs the Registrar appointed a day in July for payment, but refused to allow the plaintiffs the whole rate of interest falling due in April, but only so much as will have accrued due on the date of payment.

Marsh, for plaintiffs.

Plumb, for defendant.

Held, that the Registrar was right, as the mortgagees are calling in their money, they will be entitled to interest for the time the money has been on loan only.

Application refused.

Proudfoot, V.C.] [Feb. 12.]

STEVENSON V. BAIN.

Contract of sale—Loss after execution of.

A purchaser at a sale under decree signed the usual contract to purchase and paid the deposit. The next day the buildings on the property were burned down.

Held on appeal, that the loss would not fall on the purchaser as the interest contracted for did not vest in him till the report on sale became absolute.

Proudfoot, V.C.] [Feb. 12.]

FLEMING V. McDUGALL.

Application of purchase money—Prior mortgagee.

A purchaser at sale under a decree having paid his purchase money into court, mortgaged the lands, conveyed the equity of redemption and then inadvertently, and without legal advice took a vesting order without seeing to the application of his purchase money to the payment of a prior mortgage. The Referee made an order for the payment out of Court of his claim to the prior mortgagee. A subsequent mortgagee appealed from this order.

Cassels, for the appellant.

Moss, for the purchaser.

Held, that the rule that the purchaser will be bound by any act of his shewing an intention on his part to fulfil the contract, and to waive any claim in regard to the matter in question, ceases to apply when it is satisfactorily established that the purchaser's act was occasioned by inadvertence, mistake or was done without proper advice.

Held also, that the covenants in a short form mortgage are absolute, and extend to all incumbrances, whether made by the mortgagor or not.

Appeal dismissed with costs.

Proudfoot, V.C.] [Feb. 12.]

HYDE V. BARTON.

Dower—Delay in proving claim for.

Bill for sale upon a mortgage. Defendants were the widow and heirs of the mortgagor. Usual decree with reference as to encumbrances. Widow did not prove her claim for dower in the Master's office. The sale took place, and on application of the purchaser the Referee made an order dispensing with payment into Court, and vesting the estate in the purchaser.

The widow seeks to establish her claim and appeals from this order.

Murray, for the appellant.

Cassels, for the purchaser.

Hoyles, for the plaintiff.

Held, that the same principles should govern an application to dispense with pay-

ment into Court, as apply to an application for payment out of Court. The money could not have been paid out without notice to all parties including the widow.

The appeal was allowed, but without costs as the dilatory conduct of the widow invited discussion.

Proudfoot, V.C.] [February 12.

STEPHENSON V. BAIN.

This was reported *ante*, page 15.

PROUDFOOT, V. C., on appeal. "I consider" (in conclusion), "that *ex parte* Minor has not been overruled, that it still remains good law, and that the order in this case (of the Referee) must be discharged."

Blake, V.C.]

NELLS V. GRAHAM.

Guardian's costs.

The plaintiff took out the usual order appointing a guardian *ad litem* for an infant defendant.

The minutes of the decree which directed the plaintiff to pay the guardian's costs were spoken to.

Boyd, Q.C., for plaintiff.

Hoyles, for defendant.

Hoskin, Q.C., for infant defendant.

BLAKE, V.C., directed that the decree should go as settled by the Registrar. Costs in the cause.

MASTER'S OFFICE.

Blake, V.C.] [Sept. 22, 1879.

RE BERKELEY'S TRUSTS.

Remuneration of trustees.

Trustees, on assuming the trust estate, are not to be allowed a commission for merely taking the same over; but trustees properly dealing with the estate and handing it over upon the determination of the trust are entitled to a commission for the receipt and proper application of the estate payable out of the corpus. Trustees are not entitled to a commission for the investment or reinvestment of the funds of the estate. Trustees

are entitled to a commission on the receipt and payment of the income of the estate, payable out of the income, and to a compensation for looking after the estate payable out of the corpus. Trustees may not unreasonably be allowed something for services not covered by the commission awarded.

Mr. Taylor.]

[Oct. 22, 1879.

WESTERN V. INCE.

Receiver—Application of—Liability of.

On the 29th January, 1878, an order was made directing that J. C. Daniels be receiver in the suit, he first giving security to the satisfaction of the Registrar.

At the date of the order and previously thereto, Daniels was the agent of the mortgagor, and as such collected all rents of the property in question.

Daniels received verbal notice of the order and executed his own bond as security which the Registrar declined to accept. Daniels continued to receive the rents and pay them to the mortgagor.

On the 20th May, Daniels executed a second bond reciting order of 29th January, and conditioned that he "do and shall account for every sum of money which he shall receive on account of the rent" which was filed on 22nd May, and on 3rd June, a copy of order of 29th January was served on him, and he was notified that his security had been accepted.

Held, by the M. in O. that Daniels was accountable for the rents received since the 29th January, but was entitled to be allowed for any disbursements properly made by him.

On appeal, SPRAGGE, C. sustained the Master's judgment.

Mr. Taylor,]

[Dec. 1879

Blake, V.C.]

[Jan. 1880.

COURT V. HOLLAND, *ex parte* DOLAN.

Subsequent encumbrancer—Claim of onus of proof.

A decree for redemption was made in the cause which directed an account to be taken

of the amount due by the plaintiff to the defendants.

The defendants, the Dorans, on proving their claims in the M. O., produced their mortgages and filed an affidavit verifying their claim, and stating that \$20,309.88 was due them for moneys advanced by them to the mortgagor, and secured by the said mortgages.

Held by the Master in Ordinary that their claim was *prima facie* proven, and the onus of reducing the amount of it rested on the plaintiff.

On appeal, BLAKE, V. C., upheld the Master's judgment.

Mr. Taylor.]

[Feb. 23.]

BISSETT V. STRACHAN.

Taxation.

The bill had been filed by a simple contract creditor, to obtain judgment to prevent the alienation of land.

During the continuance of the suit one of the defendants made an application in Chambers to have the *lis pendens* removed. This was granted, with costs. The plaintiff then dismissed his bill with costs.

The defendant above mentioned thereupon brought in his bill for taxation, which consisted of only one item—viz., instructions to defend, \$4.00, together with the usual charges of having a bill taxed.

It appeared by the affidavit that the bill had never been served, and that no answer had ever been drawn or filed; but defendant's solicitor swore that he had taken instructions to draw the answer some two months before the dismissal of the bill.

The Master in Ordinary, on appeal from the taxing officer, held that the defendant was entitled to tax his instructions, but they were taxed at \$2.00 only, because instructions had already been taxed on the motion to remove the *lis pendens*.

H. Cassels for plaintiff.

Ewart for defendant.

CANADA REPORTS.

QUEBEC.

SUPERIOR COURT.

GUEST V. MACPHERSON.

Damages for libel—Criminal proceedings not a bar to action for civil damages; but punitive damages will not be awarded after defendant has been convicted and punished in a criminal court for the same libel.

[Montreal, February 23.]

MACKAY, J., said this was an action of damages brought against the defendants for libelling the plaintiff in a certain scurrilous paper called *City Life*. There had been a criminal indictment for libel against the defendant, and a true bill being returned, he had been tried and found guilty. The defendant was then punished by a fine of \$100, and costs, under the Dominion Libel Act, taxed at \$50; so that he had already paid in the Criminal Court \$150. Now the sum of \$500 fresh damages was asked against him by a civil action. The plaintiff claimed both special and nominal damages—special for moneys that he had expended for fees in the Criminal Court beyond what his attorney's bill was taxed at, and he alleged further, that he had been hurt in his feelings, &c. The plea denied malice, and alleged that the whole thing was meant for a mere joke; that the publication did not hurt the plaintiff, and that in the Criminal Court the defendant had made an apology for his practical joke. His Honor did not see that in this court the defendant's pleas amounted to an apology, but rather raised the objection that by the action *au criminel* the plaintiff was debarred from proceeding by civil action. The defendant was wrong as to this. The two remedies compete, and in France it is quite common to join the two. The plaintiff was entitled to both remedies. He had taken proceedings in the Criminal Court, and now he came here and asked for damages special and nominal. He was entitled to some damages. The defendant's plea was bad as to criminal proceedings being a bar to civil action. But the ques-

GUEST V. MACPHERSON—SKERVING V. HONEYMAN AND McDONALD.

tion of degree or measure of damages came up: for there were damages nominal, damages compensatory, and damages punitive. The plaintiff might have come here for his civil damages at once, but he had harassed the defendant by getting him convicted by a petty jury, and involved in all the ignominy of criminal punishment. There was no occasion, therefore, for more punitive damages. There was no suggestion of express malice. The defendant was evidently a stupid fellow, who went in for fun, and was in for damages here; but his Honor would not award punitive damages, but only nominal. The Court could not award as damages the *honoraires* which had been paid to lawyers in the Criminal Court for attending to the case. Judgment would go for \$20 damages, and costs of the lowest class, Superior Court.

—*Legal News.*

ONTARIO.

GENERAL SESSION OF THE PEACE —COUNTY OF OXFORD.

SKERVING, *Appellant*, and HONEYMAN, *Respondent*; and SKERVING, *Appellant*, and McDONALD, *Respondent*.

Conviction for Practising Medicine without license. 37 Vict. cap. 30. O.

These were two appeals from the convictions of the appellant for practising medicine contrary to the statute 37 Vict. cap. 30, Ont.

One was a conviction on 20th March, 1879, on the complaint of Ebenezer Honeyman, before one Justice of the Peace. The other was a conviction on the 8th May, 1879, on the complaint of Hector McDonald, before two Justices of the Peace. In each case the appellant was ordered to pay a fine of \$25 and costs, or in default to be imprisoned one month.

Both appeals were argued at the June Sessions, 1879, and the Court was adjourned for the purpose of giving judgment.

Beard, for the appellant, admitted that he had practised under such circumstances as required him to be registered unless he

came under the protection of the Imperial Act, and for the purpose of showing he was entitled to such protection.

James Skerving being sworn, said, "I am the appellant. I am licentiate of the faculty of Physicians and Surgeons, Glasgow, Scotland. I registered in the City of Edinburgh and got certificate. Archibald Ingles, Branch Registrar of Scotland, handed me this certificate. He gave it to me at his private residence. He acted as such Branch Registrar. There was a fee of £5 which was paid by me at that time. I produced my diploma and he registered it. My certificate has never been cancelled. I have applied for registration in Ontario. I have paid my fee, \$10. It was tendered on the 2nd August, and again on the 13th August, and 3rd time on 3rd September. Registrar said he could not take it. He would not take the money in September, but I afterwards mailed it to him and I got receipt for it. Dr. Pine is the Registrar. The certificate produced was got from Dr. Pine for use at this Court. I practised three years in Scotland, and a few months as Surgeon on the Allan Line Steamers.—Cross-examined in answer to Mr. Bull. I mailed the money after the offence was committed, if any.

Cross examined.—I got the book produced from Churchill, the publisher, in London, on page 910 my name appears; the book was published in 1877; on page 882 Archibald Ingles' name appears as the purser who gave me my certificate and was acting as Registrar of the Medical Council.

Ball, Q. C., for respondent, admitted that appellant was a registered practitioner of the Scottish Branch of the General Medical Council. It is admitted also that he was not registered in Canada under the R. S. O. cap. 142, but contended that he was properly convicted for a breach of "the Ontario Medical Act" in not being registered, and that his remedy to enforce registration was by mandamus, and referred in support of his contention to the "Canada Lancet," of 1st September, 1879, containing the correspondence between the Imperial and Canadian Governments on this subject.

Beard, for appellant, contended that the

SKERVING V. HONEYMAN AND McDONALD.

latter had a right to practise without registration under the Imperial Act 21 & 22 Vict., cap. 90, that the 31 & 32 Vict., cap. 79, sec. 3, giving power to Colonial Legislatures to enforce registration of persons registered under the Imperial Act has not been acted upon, but the Ontario Medical Act leaves it optional with the "Council" to admit to registration persons registered under the British Medical Act.

MACQUEEN, Co. J.—It being admitted and indeed proved, that the appellant was duly registered under "the British Medical Act" can these convictions for breaches of the Ontario Medical Act be sustained? I think not. By the 31 sec. of the Imperial Act, 21 & 22 Vict., cap. 90, it is declared that "Every person registered under this Act shall be entitled, according to his qualification or qualifications, to practise medicine or surgery, or medicine and surgery, as the case may be, in any of Her Majesty's Dominions."

This Act, then, extending its provisions to Canada, as a portion of Her Majesty's Dominions, gave to medical practitioners registered under it the right to practise their profession in this Province without any further examination and without the payment of any fees.

But the force of this enactment has, it appears to me, been since restrained, 1st, by the passing of the British North America Act (1867), which conferred upon Provincial Legislatures powers to make laws in relation to property and civil rights in the Province, and exclusively in relation to "education" and secondly, by the Imperial Act, 31 & 32 Vict. cap. 29 (1868), whereby the right to deal with this matter, as conferred by the British North America Act, was in effect limited.

Now, had the last mentioned Act not been passed, the power of our Provincial Legislature to deal with the whole subject as conferred by the British North America Act, was undoubted, for the Provincial Legislature had the whole field for action in the matter, and the Imperial Act, 21 & 22 Vict., cap. 90, would have been, in so far as any Province of Canada was concerned, virtually repealed the moment any Province

of Canada granted a law containing provisions on the subject of registration of medical men, the practice of their profession, and the recovery of fees, &c. But the Imperial Act, 31 & 32 Vict., cap. 29, having been passed, resuming the authority which it undoubtedly possessed, and relaxing the law in some measure in favour of the Colonies, enacted, in its 3rd section, "that any person who has been duly registered under the Medical Act (21 & 22 Vict.) should be entitled to be registered in any Colony, upon payment of the fees (if any) required for such registration, and upon proof, in such manner as the Colonial Legislature shall direct, of his registration under the said Act."

Under this last enactment, the ordinary prerequisite of submitting to an examination before a Provincial Board was dispensed with, whilst it preserved to the duly registered practitioner under "the Medical Act" the right to claim registration here upon the payment of any fees the Provincial Legislature might require.

The facts of these cases are such as entitle the appellant to have those convictions quashed, for all he had to do, to enable him to practise, was to prove his registration and pay his fees, and having proved the one and tendered the other, he has complied with all the requirements of the law.

It may be remarked here, that the Local Legislature might have passed a law for the purpose of enforcing the registration of persons under its jurisdiction who have been registered under the "Imperial Medical Act," but I do not see that any such power has been exercised. There has been an optional power purporting to give to the Provincial Medical Council the right of admitting to registration all such persons as are duly registered in the medical register of Great Britain, upon such terms as the Council may deem expedient, which, in view of the Imperial statute in force when the Provincial Act, 37 Vict., cap. 30, was passed, may be considered as *ultra vires*.

The conviction of the 20th March, 1879, is bad, for not shewing when or where the offence was committed; and for all that appears on the face of the conviction, the offence may have been committed whilst

REG. EX REL. CURRIE V. McLEAN—CORRESPONDENCE.

practising in Scotland,—nor does it appear even to have been sealed.

Both convictions are quashed with costs.

I have come to this conclusion without any regret, as I think the appellant has been harshly dealt with, in being harassed with a second prosecution pending an appeal from the first conviction.

Convictions quashed with costs.

SCHOOL LAW.

REG. EX REL. CURRIE V. McLEAN.

Election of School Trustee.

Stratford, Feby. 9.

This was an application in the nature of a *quo warranto* made to the Judge of the County Court of the County of Perth, under Ontario Statutes of 1879, chap. 34, sect. 7, ss. 9, to set aside the election of John McLean to the office of Public School Trustee for the south ward of the Town of St. Mary's, in the said county, to which he was elected on the 7th day of January last.

The principal ground of objection alleged was, that the alphabetical list required by the 4th section of said Act, was taken from the Assessment Roll of the Town for the year 1878, instead of from the "then last Revised Assessment Roll" as required by the Statute, which would be the Roll of 1879.

LIZARS, Co. J., held the election bad and ordered new election, but without costs.

CORRESPONDENCE.

Legal Education.

To the Editor of THE LAW JOURNAL.

Even the general public are discussing the total neglect in this Province of legal education in its proper sense, and the profession surely ought to consider the question, and, if possible, devise some scheme to remove the reproach.

In almost every State of the Union, law schools exist, and the larger portion of the younger members of our profession in that country have attended such schools and have a fair knowledge of the theory of law. In England, too, of late years, excellent lectures have been delivered in connection

with the Inns of Court upon all branches of law, including Roman jurisprudence. Even in Quebec, advocates of recent admission have invariably attended law lectures in connection with the different Universities, principally McGill and Laval. What has been done with us? The writer is not aware that a single lecture in law will be delivered in this Province this year.

The Law Society have ample funds for the purpose, and tax all students excessively; but, by some strange apathy, even the slight effort heretofore made to impart to such as chose to attend lectures some theoretical knowledge of law has been abandoned. This has been attributed to the action of the Benchers residing out of Toronto; but the writer is inclined to think that a more cogent reason was the fact that the remuneration of the lecturers was not sufficient to induce them to prepare their lectures with sufficient care. Also, the students attended their lectures after a harassing day's work and with minds ill adapted to receive any permanent impressions from what they heard. What benefit would medical students derive from their lectures, were their attendance limited to an hour or two in the afternoon and evening after a hard day's work compounding medicines in the surgery of some physician, who paid them for such services and expected full value for such payment. Our system of education is an erroneous one, and produces a profession of narrow ideas and lacking entirely any knowledge of the theory of law. Many of its members, no doubt, in after life acquire this knowledge by mere force of will but under terrible disadvantages. How many lawyers in this Province have read Austin's Jurisprudence, the works of Maine, or the Institutes of Justinian. Probably not one in twenty, and possibly hardly half are aware of the existence of the two former of these works.

In the writer's judgment there is but one remedy for this. The drudgery of office work must not be done by students. The relationship existing between a lawyer and his pupils, as regards imparting a knowledge of law, must not be the mere myth it has been of late years; and better still,

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all students intending to become *Barristers* should attend, for a stated period, lectures delivered by gentlemen who are sufficiently remunerated to make them more than a mere matter of form, and during the period of such attendance the student should have no other duties than attendance on such lectures. Law students are sufficiently taxed to enable the Law Society or such other institutions as may have charge of their education to procure for them teaching of a high character. This education should not be merely the narrow education now imparted or attempted to be imparted, but ought to embrace Roman law, Constitutional law, and particularly such generalizations of laws as are referred to in the works of Maine, Lavaleye, and kindred writers.

VINDEX.

*Unlicensed Conveyancers.**To the Editor of the LAW JOURNAL.*

SIR,—Your editorial remarks, and the correspondence which appeared in the last issue of the *LAW JOURNAL* in referring to “unlicensed conveyancers” could not have been more timely. Like noxious weeds this class of people seems to be increasing at a great rate. I speak not only as a member of the profession, but in the interest of the people generally (to whom these so called conveyancers, &c. &c., are a terrible curse), when I say that repressive measures should be introduced against them. In addition to the remedies already proposed I beg to submit another for consideration. It strikes me that a practicable plan to prevent people on the score of cheapness (forsooth) to go to these conveyancers would be this:—Put a tax of—say \$5 on every instrument to be registered in the Registry Office, or chattel mortgage filed in the office of the Clerk of the County Courts unless the instrument bears a certificate from a duly qualified Barrister or Attorney, that it was prepared by him. This is a plan I propose in addition to others which have appeared in the *LAW JOURNAL*, and which seem very good.

Let the profession continue to agitate this question until they succeed in getting pro-

tection, not only for themselves, but for the whole people. Attorneys are under severe penalties unless they take out their annual certificates and pay a good sized fee therefor. Why should not unlicensed pettifoggers be under penalties as well as duly qualified professional men who have to spend much time, labour, and money to acquire their profession. I agree with your remarks and those of one of your correspondents in laying the blame on the Benchers of the Law Society in this matter, and I speak with much feeling as it happens that in the Registry offices of the county in which I practise, over one half of the documents registered are drawn by “conveyancers,” &c.

Yours,

PRACTITIONER.

February 28th, 1880.

*Sheriffs' Fees.**To the Editor of the LAW JOURNAL.*

SIR,—One important point, that seems to have been overlooked both by your correspondent “B.” and Sheriff McKellar, in reference to the service of bills in Chancery, writs of summons, and other process requiring personal service, is the practice that very justly prevails, in order to avoid delays, &c., of lawyers accepting service of process for their clients from whom they have received a general retainer. In the case of Banks, Insurance, Railway and other corporations this practice is very general. Again, a lawyer usually writes a letter threatening, sent before commencing proceedings, and the recipient hands the same to his lawyer, who if he advises him to defend, invariably writes the opposing attorney that he will accept service of papers for his client. It will be found if the matter be traced up, that in the greatest number of cases mentioned by the Sheriff services have been effected in this way. As far as overcharges are concerned and the slurs endeavoured to be cast on an honourable body of men by Sheriff McKellar, he should be the last one to name such a subject. He should “let sleeping dogs lie,” for in case this subject is ventilated it will be very little to his credit.

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Let him challenge an investigation if he dare on the subject of overcharges, and such a mass of testimony will be forthcoming as will consign him and his Little Book to the shades of oblivion.

"ONE WHO KNOWS."

Hamilton, March 10th, 1880.

The Law School.

To the Editor of THE LAW JOURNAL.

DEAR SIR,—The recent action of the Council of the Law Society, in abolishing the Law School at Toronto, has had the very beneficial effect of drawing public attention to the disadvantages under which law students in this Province labour, with regard to professional instruction. At the present time, the only encouragement given to students who are willing to study, is the opportunity of competing for the scholarships. This is, however, practically confined to those who live in Toronto or its immediate vicinity, as no one residing at a distance from that city, cares to be at the expense of going up for the examination, with a good chance of being plucked, and getting laughed at by his fellow-students, for his presumption. This difficulty could, I think, be remedied by holding the examinations in every county town, from which applications might be received, in the same way that Public School Teachers' and High School Intermediate Examinations are now conducted, the papers being prepared by the Law Society examiners, and sent to the different counties. It may be objected that this would be expensive, but arrangements could probably be made with County Boards, who overlook the candidates for teachers' certificates, to do the same for the law students, and at the same time and place. The extra expense of examining the papers at Toronto, can hardly be urged as an objection. If the principle of giving these scholarships is a correct one, the more students who participate in the competition, the greater will be the good done, and there is no reason why money should be spent in aid of Toronto students to the exclusion of those in other parts of the Province. At any rate, every student pays into the trea-

sury of the Law Society \$210, or \$42 per year during his clerkship, so that an increased expenditure on behalf of students should not be considered out of place by those who pay only \$17 per year, and at present spend all the money on themselves.

Five years is a long time to serve under a solicitor before being admitted to practice. This term is probably inspired with two objects in view. The first of these is to make sure that the student shall be well qualified before he is admitted, and the second is that the profession may be kept select—neither of these objects is attained. The only way in which the Law Society can secure proficiency in its members, is by making the examinations a real test. Some students will learn more in one year than others do in five, but all are now placed on the same level. Is it not a fact that a large number of students-at-law hardly ever look at a book until a month or so before the examination, then cram up, pass with a point or two to spare, and get the same standing in reality as the man who comes out first? Of course those who get up their work well feel the benefit of it in the future when practising, but that is no reason why they should not also be rewarded in the present. This could be accomplished by allowing a reduction in the time of all who reach a certain standard at the Intermediate, the same way as was formerly done in the Law School. Merely compelling a person to put in five years in a law office will never have the effect of providing the country with good lawyers, when there is nothing to prevent the whole five years from being frittered away, as is done by so many Ontario students. Again, the five years' rule has not the effect of keeping the profession select. It is no doubt of great advantage to the country, that the profession of law should be continually recruited by able and honourable men, and that it should be difficult for any others to enter it. But is this the natural result of this present regulation? On the contrary, the road is made easy to those who are least needed and hard to those who would bring strength to the bar. A great many well qualified by nature to become lawyers have not the

CORRESPONDENCE—OBITUARY—BOOKS RECEIVED.

means to sit down at a desk for five years, with little or no salary, while rich men's sons, no matter what their mental calibre may be, are articled at the age of 17 or 18, and after putting in a good time for a few years, emerge as full-fledged barristers with no knowledge of the world, and very little of their profession. On the other hand, many a young man endowed with good abilities but no money, and mature enough to know what he is best fitted for, is much embarrassed by being compelled to serve so long an apprenticeship. If a student is willing and able to accomplish all that is required of him in three years, what advantage can it be to lawyers or to the public at large, to keep him five years at it.

Let me in conclusion express the hope, that the Council of the Law Society may find it advisable to consider, at an early day, whether the matters I have alluded to, are not of sufficient importance to call for some change.

Yours respectfully,

JOSEPH MARTIN.

Ottawa, February 23rd, 1880.

OBITUARY.

GONZALVE DOUTRE, Q. C., B. C. L., LL.D., Lecturer upon Civil Law, McGill University, died at Montreal, February 28th, 1880, at the age of 37. He was brother of M. Joseph Doutre, Q. C. (well known in connection with the *cause celebre* of L'Institut Canadien and the Romish Church; better known as the *Guibord case*), and a member of the legal firm Doutre, Doutre, Branchard & McCord. He edited a condensation of *Le Droit Civil of Lower Canada*, a work showing vast industry and much research. Mr. Doutre was also a writer in *Le Pays* and other French newspaper, and author of pamphlets upon *Droit Civil*, *Droit National* &c; lectures before L'Institut Canadien and the Law Society. He was a graduate of McGill in 1861, and was admitted to the Bar in August 1863. He was for some time secretary of the General Council of the Lower Canadian Bar.

BOOKS RECEIVED.

THE LAW OF EXTRADITION. By Samuel T. Spear. Albany: Weed, Parsons & Co. SNELL'S EQUITY. Fifth edition. Stevens & Haynes, London. 1880.

MCINTYRE & EVANS. Summary of the Practice under the Judicature Act. William Amer, London. 1877.

THE STRUGGLE FOR LAW. Callaghan & Co., Chicago. 1879.

PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES. By Adolphus Todd. Boston: Little, Brown & Co. 1880.

A MANUAL OF GOVERNMENT IN CANADA. By D. A. O'Sullivan. Toronto: J. C. Stuart & Co. 1879.

THE POWERS OF CANADIAN PARLIAMENTS, By S. J. Watson. Toronto: C. B. Robinson. 1880.

WILLIAMS ON PETITIONS IN CHANCERY AND LUNACY. Stevens & Haynes. 1880.

FLOTSAM AND JETSAM.

In an appeal of death, the defendant waged battle, and was slain in the field; yet judgment was given that he should be hanged, which the judges said was altogether necessary, for otherwise the Lord could not have a writ of *escheat*.

A deaf witness was, the other day, called upon at a police court to "kiss the book." True to her instincts, the old lady caught readily the word "kiss," and at once offered her face to a solicitor near her. The magistrates joined heartily in the laughter which the incident caused.

THE BENCH AND THE BAR IN AMERICA.—The Indiana judges stand no nonsense from the bar. A lawyer there, lately, in the course of his argument, used the word "disparagement." "Stop using Latin words," said the judge, "or sit down." The poor lawyer, undertaking to explain, was ruthlessly fined twenty dollars for contempt.

JUDGE MILLER.—The last time I met Joaquim Miller, the American poet, says the London correspondent of a contemporary, he spoke of himself as "Judge" Miller. I expressed my delight and surprise. I had been unaware of his judicial

FLOTSAM AND JETSAM.

dignities. Indeed, I did not even suspect that he knew any law. Upon my expressing my surprise, he replied, calmly, "Yes, sir, for four years I administered justice in Oregon—with the help of one law-book and two six-shooters."

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SUPREME COURT EXAMINATION IN INDIANA.—Years ago a young law student emigrated from New England to the State of Indiana, and applied for admission to the Bar, the examinations then being required before the Supreme Court in public session, as at the present time in Illinois. Judge Stevens was then presiding, and acted as examiner. "Let the applicant for admission come forward," proclaimed the Judge, in a commanding and lofty tone. The crowded court room was silent and sympathetic, as the modest and embarrassed young stranger presented himself before the Judge with eyes as downcast and nerves as tremulous as if he had been arraigned for crime. "Young man," demanded the Judge, with sternness and oppressive pomp, "*What is the first great duty of a lawyer?*" "*To secure his fees, Sir,*" squeaked out the bashful student, in a voice of girlish clearness. This answer to a question strangely general and indefinite, so apt and unexpected, produced an irrepressible burst of laughter at the Judge's expense, who, blushing and indignant, cried out to the clerk, "prepare a license for the applicant—I find him well qualified to practise law in the State of Indiana." The student became a wealthy and distinguished lawyer and citizen—the late Hon. James Farrington, of the city of Terre Haute, a gentleman universally respected and beloved.

A correspondent of the *Albany Law Journal* has unearthed two points in criminal practice from the old reports. In the trial of the Seven Bishops, after the charge to the jury, the following colloquy took place. The Lord Chief Justice: "Gentlemen of the jury, have you a mind to drink before you go?" Jury: "Yes, my Lord, if you please." [*Wine was sent for, for the jury.*] Afterwards the following conversation ensued. Jurymen: "My lord, we humbly pray that your lordship would be pleased to let us have the papers that have been given in evidence." Lord Chief Justice: "What is that you would have, sir?" Mr. Solicitor-General: "He desires this, my lord, that you would be pleased to direct that the jury may have the use of such writings and statute books as may be

necessary for them to make use of." Lord Chief Justice: "The statute books they shall have." The "treating the jury," it is pointed out would probably vitiate a verdict at this day, but the authorities are not uniform. See *Van Buskirk v. Dougherty* 44 Iowa, 62; *Kee v. State*, 28 Ark. 155; *Perry v. Bailey*, 12 Kas. 539; *Redmond v. Royal Ins. Co.*, 7 Phila. 167. As regards the second point, in *Merrit v. Navy* 10 Allen, 416, a new trial was granted because the judge who presided allowed the jury to have a copy of the general statutes in the jury room while deliberating on their verdict. The ancient authority above mentioned does not appear to have been cited in the argument of the latter case.

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SINGULAR CASE OF DISPUTED IDENTITY.—A court-martial sitting in Paris has just sentenced to five years' penal servitude a man named Charles Drouhin, who was convicted nine years ago of having given information to the Germans during the siege, and who, having escaped from prison during the Communist insurrection, was recaptured under very peculiar circumstances. When the insurrection was over, Drouhin had disappeared, and nothing more was heard of him until last year, when an old man with a long white beard came to the office of the registrar of the court, and asked to be allowed to consult some of the documents filed in connection with the case, alleging that he was the eldest brother of Drouhin, who had died in an hospital a short time before. The registrar let him have the documents, but it suddenly occurred to him that the visitor must be Drouhin himself. Inquiries were made, and Drouhin, who was found begging at the porch of a church in the Rue St. Honoré, was arrested. He stoutly denied the accusation. When confronted with the warders of the prison in which he had been confined nine years ago none of them recognised him, and everything pointed to an acquittal at the trial, when the officer presiding ordered the prisoner to be taken out and shaved. He protested energetically, declaring that his occupation as a model would be gone if he were deprived of his flowing white beard; but the court was inexorable, and when he emerged from the barber's hand the warders recognised him at once. He still protested that he was the brother of the man whom they took him for, but the barber's razor had removed all doubt, and Drouhin went back to prison to serve the remainder of his term.

LAW SOCIETY, HILARY TERM.



Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 43RD VICTORIÆ.

During this Term, the following gentlemen were called to the Bar, (the names are not in the order of merit, but in the order in which they stand on the Roll of the Society):—

GEORGE WHITFIELD GROTE.
 WILLIAM COSBY MAHAFFY.
 P. A. MACDONALD.
 WILLIAM LAWRENCE.
 WILLIAM LEIGH WALSH.
 JOHN J. W. STONE.
 COLIN SCOTT RANKIN.
 HORACE COMFORT.
 ALEXANDER V. MCCLENEGHAN.
 MARTIN SCOTT FRASER.
 WILLIAM PATTISON.
 WM. REUBEN HICKEY.
 GEORGE MONK GREEN.
 JAMES THOMAS PARKES.
 MICHAEL J. GORMAN.
 HARRY EDMUND MORPHY.
 CHARLES AUGUSTUS KINGSTON.
 JOHN HY. LONG.

Special Cases.

JAMES C. DALRYMPLE.
 JOHN JACOBS.

The following gentlemen have been entered on the books of the Society as Students-at-Law and Articled Clerks:—

Graduates.

PETER L. DORLAND.
 LEWIS CHARLES SMITH.
 MATTHEW M. BROWN.
 PETER D. CRERAR.
 RUFUS ADAM COLEMAN.

Matriculants.

ANDREW GRANT.
 JAMES MACCOUN.
 FRANCIS R. POWELL.
 JOHN TYTLER.
 THOMAS JOHNSTON.

Primary Class.

ROBERT VICTOR SINCLAIR.

HECTOR COWAN.
 WILLIAM BEARDSLEY RAYMOND.
 WILLIAM ALBERT MATHESON.
 ARTHUR B. MCBRIDE.
 FRANK HORNSBY.
 WILLIAM AUSTIN PERRY.
 JOSHUA DENOVAN.
 M. J. J. PHELAN.
 ARTHUR EDWARD OVERELL.
 ROBERT SMITH.
 HUGH MORRISON.
 JOHN MCPHERSON.
 AMBROSE KENNETH GOODMAN.
 J. A. MCLEAN.
 THOMAS IRWIN FOSTER HILLIARD.
 RANALD GUNN.
 PHILIP HENRY SIMPSON.
 JOHN GRAEE.
 EDWARD A. MILLER.
 JOHN GREER.
 DANIEL FISKE McMILLAN.
 CHARLES ADELBERT CRAWFORD.
 FREDERICK ERNEST COCHRANE.
 WILLIAM PEARCE.
 ANDREW GILLESPIE.
 G. A. KIDD.

Articled Clerks.

G. R. VANNORMAN.
 E. M. YARWOOD.
 J. HEIGHINGTON.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

Ovid, *Fasti*, B. I., vv. 1-300; or,
 Virgil, *Æneid*, B. II., vv. 1-317.
 Arithmetic.
 Euclid, Bs. I., II., and III.
 English Grammar and Composition.
 English History—Queen Anne to George III.
 Modern Geography—North America and Europe.
 Elements of Book-keeping.

Students-at-Law.

CLASSICS.

1880 { Xenophon, *Anabasis*, B. II.
 { Homer, *Iliad*, B. IV.
 1880 { Cicero, in *Catilinam*, II., III., and IV.
 { Virgil, *Eclog.*, I., IV., VI., VII., IX.
 { Ovid, *Fasti*, B. I., vv. 1-300.

DIARY—CONTENTS—EDITORIAL NOTES.

DIARY FOR MAY.

2. Sun....Rogation Sunday.
4. Tues...Supreme Court sittings.
9. Sun...First Sunday after Ascension.
11. Tues...Court of Appeal sittings begin. County Court sittings for York begin. First Intermediate Examination.
12. Wed...Second Intermediate Examination.
13. Thur...Examination for Admission.
14. Fri...Examination for Call.
16. Sun...Whit Sunday.
17. Mon...Easter Term begins.
18. Tues...D. A. Macdonald, Lieutenant-Governor of Ontario, 1875.
21. Fri...Confederation of B. N. A. Provinces proclaimed, 1867.
22. Sat...Earl Dufferin, Governor-General, 1872.
23. Sun...Trinity Sunday.
24. Mon...Queen's Birthday, 1819.
30. Sun...First Sunday after Trinity. Proudfoot, V.C. appointed, 1874.

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Canada Law Journal.

Toronto, May, 1880.

It was stated at a late meeting of the Church Association in England, that no less than \$60,000 had been spent in prosecuting the notorious Mr. Mackonochie. The outlay should have been less, or the results should have been greater.

We are glad to know that a second edition of "Leith's Blackstone" is being prepared by Mr. Leith, Q.C., to whom we were indebted for the first edition assisted by Mr. James F. Smith, Barrister-at-law. It could not be in better hands, and its appearance will be gladly welcomed.

The Court of Appeal in England have held that, in questions regarding the piracy of a trade-mark, the *colour* of the marks cannot be taken into account but that the plaintiff must prove his case from a comparison of the uncoloured (i.e. black and white) diagrams: *Methall v. Vining*, 28 W. R. 330.

Lord Justice James is adding to legal terminology. In *Ex parte Morier*, 28 W. R. 236, he refers to what we used to call in the Privy Council a "Bonamee Account,"—that is, an account put by one man in another's name, merely for his own convenience. The reference evidently is to the good turn, one good friend (*bon ami*) does to another.

What with "annual rests," "wilful default," and the like, V. C. Knight Bruce was led to describe the position of a mortgagee in possession, as "the most unfortunate with which he was acquainted." This was also the view of the author

EDITORIAL NOTES.

of the quaint epitaph, said to be inscribed on a Connecticut tombstone :

"Shed not the tear for Simon Ruggle,
For life to him was a constant struggle ;
He preferred the tomb and death's dark gate
To managing mortgaged real estate."

The appeals set down for hearing before the Supreme Court during the last three terms were provided by the different Provinces in the following proportions :— From Ontario, 25 ; from Quebec, 16 ; from the Maritime Provinces, 23. We are not in a position to say what proportions these numbers bear to the volume of litigation in each, nor to the number of cases sent by each to England, but taking Ontario as the mean, the number from Quebec seems small, and that from the Maritimes would appear to be large. We might suppose that a delicate compliment is thereby intended to the Chief Justice of the Court.

We are indebted to the *Solicitors' Journal* for a note of a very important ruling in criminal practice which took place at the Leeds Assizes, upon the question whether a prisoner could both speak himself and have his counsel also to speak for him. Mr. Justice Hawkins, after conferring with Mr. Justice Lush, held as follows :— " I think that though there are *dicta* of individual judges to be found in the books that a prisoner when defended by counsel is not at liberty to make a statement to the jury, I ought not to be bound to any such *dicta*, because there is no decision of any Court of criminal appeal on the point. As a general principle a prisoner may make his statement, and give his version of the transaction in respect of which he stands charged. I shall, therefore, though counsel appears for the defence, admit the statement of the prisoners." In this, case after the end of their counsel's address, the prisoners made their

statement to the jury. The *Solicitors' Journal* suggests that the better course would have been to allow the statement to be made first, so as to enable the prisoner's counsel to comment on it: 24 Sol. J. 266.

We have heard of several cases in Ontario involving questions of testamentary capacity, in which it seems to us that the judges have been too severe in commenting on the evidence of solicitors and subscribing witnesses who are called to prove the invalidity of the will. Many of the witnesses in such cases are unlettered men, who have no notion that they are doing wrong in attesting the instrument, though they may not be satisfied that the testator understands what he is doing. In cases of this kind the evidence is nearly always very contradictory, and for the guidance of solicitors we cite from the *Solicitors' Journal* the ruling of Mr. Justice Hawkins in a case lately tried by him. He says, "that when there is a doubt of the capacity, the more prudent course is for the lawyer to prepare the will, making also a memorandum of the state in which he found the testator. Supposing, he adds, a man has a large estate to leave, and desires to make a will, a solicitor may come in and say 'I take it upon myself to determine that this man is not in a fit state to make a will.' It is a question whether it would not be a great deal better for him to prepare the will, at the same time making a note that the man was not in a fit state to make a will." 24 Sol. J. 321.

Apropos of the late rising of the Ontario Parliament, we find a letter written by Charles Dickens to Mr. Rawlinson, C. B., which embodies views that would have been considerably intensified if he had enjoyed the privilege of life in the

EDITORIAL NOTES.

Dominion of Canada. As it bears on the opening of Parliament ceremonial by the Queen, and embodies some views of Parliament by the great novelist, it may both interest and amuse :—

“TAVISTOCK HOUSE, Jan. 25, 1854.

“MY DEAR SIR,—I assure you that we are all extremely sensible of your kind remembrance and much indebted to you for your invitation ; but though reasonably loyal, we do not much care for such sights, and consequently feel that you ought to bestow the places you so obligingly offer us on some more deserving objects. The last ceremony of that kind I ever saw was the Queen's coronation, and I thought it looked poor in comparison with my usual country walk. As to Parliament, it does so little and talks so much, that the most interesting ceremony I know of, in connection with it, was performed (with very little state indeed) by one man, who just cleared it out, locked up the place, and put the keys in his pocket.

“Very faithfully yours,
“CHARLES DICKENS.

“Robert Rawlinson, Esq.”

A Bill has lately been introduced into the English Parliament by the Lord Chancellor Cairns, providing for the scale of conveyancing charges to solicitors. It is left to the judge to make orders for regulating the remuneration by a rate of commission or percentage, having regard to all or any of six considerations : 1. The position of the party for whom the solicitor is concerned—whether as vendor or purchaser, lessor or lessee, &c. 2. The place, district, and circumstances at or in which the business, or part thereof is transacted. 3. The amount of the capital money, or of the rent to which the business relates. 4. The skill, labour, and responsibility involved therein on the part of the solicitor. 5. The number and importance of the documents prepared or perused, without regard to length ; and,

6, the average or ordinary remuneration obtained by solicitors in like business at the passing of the Act. These considerations seem to exhaust all matters material to be known and weighed in order to formulate a scale of conveyancing charges, the necessity for which is just as great here as in England. There is, perhaps, one other local consideration, which so long as the Attorney-General remains supine, ought to be regarded in Ontario—that is the minimum for which the home-bred and self-taught conveyancer will undertake the like work, and the chances there are of the instrument framed by him effectuating the intention of the parties.

Mr. Morley's interesting life of Edmund Burke, in the “English Men of Letters,” Series, has probably caused many to turn with fresh interest to the remains of that high-minded orator, philosopher, and statesman. Although Burke soon himself forsook the study of law for the more congenial sphere of political life, he has left evidence in one place, at least, of the admiration with which he regarded it. In his speech on American taxation occurs a passage, which in able hands might well be expanded into an instructive and interesting essay. Speaking of Mr. Grenville, he says :

“He was bred in a profession. He was bred to the law, which is, in my opinion, one of the first and noblest of human sciences ; a science which does more to quicken and invigorate the understanding, than all the other kinds of learning put together ; but it is not apt, except in persons very happily born, to open and to liberalize the mind exactly in the same proportion.”

It may easily be conceded that the study and practice of law, if pursued exclusively, would have a narrowing effect on the mind, tend to contract the sympathies, and encourage over-much that

CALLS TO THE BAR—PRACTICE CONCERNING AWARDS.

spirit of system which Bacon in his "Novum Organum" (App. 45), points out as one of the standingsnares of the human intellect. But on the other hand there is no study which has so many kindred studies to which it naturally leads, and which it illustrates, while in turn it is illustrated by them. History, especially Constitutional and Legal History,—Physiology, in connection with Medical Jurisprudence, and even Metaphysics, are all of them connected with and useful aids to the study of law. Pursued in connection with it, they immensely add to its interest, and may turn what would, otherwise perhaps, be an irksome profession, into an elevating and pleasing pursuit. We, therefore, cannot but wish well to those who are urging the re-establishment of the law school, provided the requisite funds are at hand. It should never be said, if it can be avoided, that a desire for aid to a higher intellectual life in the rising generation remained unsatisfied.

A correspondent remarks that the "Law Society has gone largely into the manufacture of new Barristers out of old Attorneys"; and suggests that it may be attributed to the N. P. What those mysterious letters may mean, we are unable, in our editorial capacity, to fathom, and Abbott's Legal Dictionary gives us no information on the subject; but we are not quite prepared to agree with our correspondent that the matter he refers to is altogether a "growing evil." It must be remembered that in this country the two professions are practically united, and this union must be taken with its almost necessary incidents. It is true that the standard of examinations for the Bar is somewhat higher than that for Attorneys, though, after all there is no great difference; but it is also true that

the majority of those practising as barristers and attorneys, would, we think, be unable to give a very good account of the examination papers required for either one or the other, although they would, probably, from experience gained by practice, be more likely to conduct their client's business satisfactorily than would a newly fledged barrister. We are not prepared, of course, to say that every attorney should, as a consequence, and as a matter of course, be called to the Bar when he so desires it; but there is no good reason that we know of, why he should not be called if his character and attainments justify what may be termed promotion to the Bar. Every case must stand, necessarily, on its own merits, and we are not, at present, aware there has been any marked departure from what might be considered a wise discretion in the premises.

PRACTICE CONCERNING AWARDS.

Summary jurisdiction to set aside awards was first conferred upon the Courts by 9 & 10 Will. III. cap. 15 which enabled any of the parties to the arbitration to have the agreement to refer made a rule of Court. Under this statute, however, it was necessary for the parties "to insert such their agreement in their submission" (sec. 1). This provision was changed by the English Common Law Procedure Act of 1854 (sec. 17), which provided that the submission to arbitration might be made a rule of Court unless it contained words purporting that the parties intended that it should not be made a rule of Court. This was copied into our Common Law Procedure Act, and appears now in the Revised Statutes (cap. 50, sec. 201). The power to interfere summarily was supposed and until very

PRACTICE CONCERNING AWARDS.

recently held only to apply, to cases of reference by consent of parties, and it was thought that where the reference was under the special power of an Act of Parliament (as in the case of expropriation of lands by railway companies) the statute of William did not apply, and that the only remedy was by filing a bill in Chancery to get rid of the award, if the circumstances justified that course: see per Richards, C. J. C. P. in *Wilder v. Eufulo and Lake Huron R. W. Co.*, 27 U. C. R. at p. 429. But by a recent decision of the Court of Appeal in England the provisions as to summary jurisdiction have been held applicable to railway references under the statute: *Rhodes v. The Airedale Commissioners*, L. R. 1 C. P. D. 402. It is said there that the appointment of an arbitrator is equivalent to a reference by consent. The Court of Appeal in this Province has declined to extend this authority to the case of an arbitration arising from one railway crossing another, because there by the terms of the Railway Act the arbitrators are to be nominated by one of the judges (R. S. Ont. cap. 165, s. 9, sub-s. 15). This decision, *The Great Western R. W. Co.*, and *the Credit Valley R. W. Co.*, is not yet reported.

The Legislature of Ontario have lately extended the summary jurisdiction of the Courts over awards still further. An appeal can now be had from awards in all cases of compulsory reference, and in all cases of voluntary reference, where it is agreed by the terms of the submission that there shall be an appeal. (See R. S. Ont. c. 50, ss. 192, 195, 197 and 205; *Walker v. The Beaver and Toronto Mutual Insurance Company*, 30 C. P. 211.) The first case of appeal from an award under this Section was *Re The Canada Southern Railway Co. and Norvall*, 41 U. C. R. 195, when Harrison, C.J., laid it down that it was not the duty of the Ap-

pellate Court to reverse the finding of the arbitrators on the weight of evidence merely, but that it was necessary to establish some misconduct, legal or otherwise, or the disregard of some legal principle. Inasmuch as the Statute giving the right of appeal indicates that the practice upon such appeal shall be the practice which obtain in appeals from the report of a Master in Chancery, it seems proper enough to hold that there should be no interference with the finding when there is evidence to support it,—as in the well-established rule by the Equity bench, in appeals from the Master. The rule laid down by Chief Justice Harrison has been approved and followed in very recent cases by Osler J., *Re The Hamilton and North-Western R. Co.*, and *Boys*, 44 U. C. R. 626, and *Re Colquhoun and the Town of Berlin*, Ib. 631. In the former of these cases this learned Judge, whose authority on matters of practice is of great weight, intimates his view of the proper mode of appealing against the award in railway matters,—that it should be by rule nisi and upon reading the evidence taken by the arbitrators and by them transmitted to the Court.

It has been decided that there can be no rehearing by the full Court by way of appeal from the decision on an award given by a single judge: *Crain v. Trustees of Collegiate Institute of Ottawa*, 43 U. C. R. 498. The only remedy is a direct appeal to the Court of Appeal under the provisions of R. S. Ont. c. 38, sec. 18.

LAW SOCIETY.

HILARY TERM, 43RD VICTORIA.

The following is the *resumé* of the proceedings of the Benchers in Hilary Term, 1880, published by authority of Convocation:—

FEBRUARY 2nd, 1880.

The Report of the Examiners on the Ex-

LAW SOCIETY, HILARY TERM.

amination of Candidates for Call was received and read, reporting that the following gentlemen had passed a satisfactory examination, namely:—

Messrs. G. M. Greene, A. V. McCleneghan, J. H. Long, P. A. Macdonald, M. J. Gorman, W. R. Hickey, W. L. Walsh, I. B. Rankin, W. Pattison, J. T. Parkes, L. Harstone, J. J. W. Stone, C. S. Rankin, H. Comfort, C. A. Kingstone, W. Mahaffy, G. W. Grote, M. S. Fraser, H. E. Morphy, and W. Lawrence.

The Report of the Examiners on the Examination of Candidates for admission as Attorneys was received and read, reporting that the following gentlemen had passed a satisfactory examination, namely:—

Messrs. G. M. Greene, A. V. McCleneghan, H. S. Lemon, T. W. Crothers, J. B. McLaren, M. J. Gorman, D. J. Downey, J. T. Parkes, C. A. Kingstone, A. C. Shaw, A. W. Gundry, D. McLean, J. H. Long, M. Fraser, H. D. Sinclair, F. Rogers, P. S. Ross, F. J. Brown, C. A. Myers, I. R. McColl, F. W. Harcourt, and H. B. Weller.

Ordered, That Messrs. McCleneghan, Gorman, McLean, Fraser, and McColl, do receive their certificates of fitness.

Ordered, That the cases of Messrs. Greene, Lemon, Crothers, McLaren, Parkes, Kingstone, Gundry, Long, Sinclair, Rogers, Ross, and Myers, be referred to the Committee on Legal Education, for report.

Ordered, That Mr. Downey receive his certificate on filing the proper certificate of service, signed by Mr. S. R. Clarke, and that Mr. Shaw receive his certificate on filing a proper petition.

Ordered, That Mr. H. B. Weller receive his certificate of fitness on filing the proper certificate of service, signed by Mr. C. A. Weller, and that the cases of Messrs. Harcourt and Brown be considered at the next meeting of Convocation.

The Report of the Examiners on the first Intermediate Examination was received and read.

Ordered, That the following gentlemen be allowed their first Intermediate Examination, namely:—

Messrs. W. Burgess, L. F. Heyd, E. T. English, H. F. Lee, I. W. Binkley, L. G.

Drew, R. C. Hays, J. P. Fisher, F. A. Campbell, A. E. H. Creswicke, R. Tooth, D. I. Donahue, B. C. McCann, R. McLean, G. T. Ware, W. I. Shaw, A. H. Clarke, R. A. Porteous, G. T. Jelfs, I. B. Hands, J. C. T. Bown, J. G. Wallace, R. Patterson, W. Campbell, I. Canniff, I. I. A. Weir, I. R. Taylor, I. H. McCollum, H. S. Blackburn, E. A. Lancaster, J. W. Elliott, and A. McKenzie.

Ordered, That W. H. Hudson be allowed his first Intermediate Examination as a Student-at-Law.

The Report of the Examiners on the second Intermediate Examination was read.

Ordered, That the following gentlemen be allowed their second Intermediate Examination, namely:—

Messrs. E. Bodwell, T. D. Cumberland, E. R. Brown, C. Miller, E. A. Peck, R. S. Neville, J. Birnie, A. Craddock, R. Taylor, W. Steers, A. Dawson, D. F. McWatt, C. Campbell, J. A. McCarthy, I. B. Humphrey, E. G. Porter, J. V. May, W. A. Bishop, A. Stewart, W. B. Carroll.

The Report of the Legal Education Committee on the Primary Examination was received and read.

Ordered, That the following gentlemen be entered on the books as students, namely:—

GRADUATES OF UNIVERSITIES.

Peter L. Dorland, Lewis Charles Smith, Matthew M. Brown, Peter D. Crerar, Rufus Adam Coleman.

MATRICULANTS OF UNIVERSITIES.

Andrew Grant, James Macown, Francis R. Powell, John Tytler, Thomas Johnston.

JUNIOR STUDENTS.

R. V. Sinclair, H. Cowan, W. B. Raymond, W. A. Matheson, A. B. McBride, F. Hornsby, W. A. Perry, J. Denovan, M. J. J. Phelan, A. E. Overell, R. Smith, H. Morrison, J. McPherson, A. K. Goodman, J. A. McLean, T. J. F. Hilliard, R. Gunn, P. Simpson, J. Geale, A. E. Miller, John Greer, D. F. McMillan, C. A. Crawford, F. E. Cochrane, W. Pearce, A. Gillespie, G. A. Kidd.

Ordered, That the following gentlemen be entered on the books as Articled Clerks, namely:—

LAW SOCIETY, HILARY TERM.

G. R. Vannorman, Jr., E. M. Yarwood, J. Highington.

Ordered, That Mr. Eddis be appointed Auditor of the Society for 1880.

The Report of the Legal Education Committee, on the cases of Messrs. F. E. Redick and George McLaurin, was read and adopted.

The Report of the same Committee, on the subject of the restoration of the Primary Examination for Easter and Trinity Terms, was received and read, and ordered for consideration at the next meeting of Convocation.

The Balance Sheet for 1879, was read by the Secretary.

Ordered, That it be referred to the Auditor.

The letter of Mr. Hutchison, with enclosures, as to the arrangement between the London Loan Company of Canada and its Solicitor, was read, and referred to the Committee on Discipline, to report whether the paper disclosed a *prima facie* case for action on the part of Convocation.

The Report of the Finance Committee was [received, read, and ordered for consideration at the next meeting of Convocation.

The question of the erection of Assize buildings on the Osgoode Hall grounds was adjourned to Saturday, the 7th inst.

Mr. Robertson moved that Mr. Maclean be appointed a Committee to draw the attention of the Attorney-General to the defective character of the short-hand writers' notes of evidence furnished to the profession.

The Secretary presented a return, pursuant to Mr. Irving's motion, of the names of those who have paid and made default in payment of their annual fees.

The following gentlemen were then called to the Bar, namely:—Messrs. Greene, McCleneghan, Long, Macdonald, Gorman, Hickey, Walsh, Patterson, Parkes, Stone, C. S. Rankin, Comfort, Kingston, Mahaffy, Grote, Fraser, Morphy, and Lawrence.

Mr. Martin gave notice that when the report of the committee on Legal Education came up for consideration, on the 3rd inst., he would move that the rule allowing students of Universities to be admitted as

Students-at-Law, or Articled Clerks on presentation of their certificates, be rescinded.

Mr. Leith gave notice that he would move to add such works on Natural Philosophy and Science as Convocation or the Legal Education Committee might approve of, in lieu of German, as a subject for examination in the Primary Examinations, or to add such works as an additional optional subject. The change proposed to come into force in Michaelmas Term next.

FEBRUARY 3rd, 1880.

The cases of Mr. Brown and Mr. Harcourt were considered.

Ordered, that they receive their certificates of fitness.

The papers of Mr. James Colden Dalrymple, an Attorney of more than ten years' standing, who applied for call to the Bar, were laid before Convocation,

Ordered, That Mr. Read, Mr. Leith, and Mr. Mackelcan be appointed a committee to examine and report in this case, under the rules for special cases.

The Legal Education Committee reported on the cases of Messrs. Myers, Greene, Lemon, Crothers, McLaren, Kingston, Long, Sinclair, and Ross,

Ordered, That they receive their certificates of fitness.

In the case of Mr. F. Rogers, his time not having expired, and not expiring during term, his petition could not be entertained.

Ordered, That Messrs. Gundry and Parkes receive their certificates of fitness.

The report of the Finance Committee relating to the grant to the Hamilton Law Association was received and read.

Ordered, That the Initiatory grant to the Hamilton Law Association, of \$432, be paid.

Mr. Ferguson was unanimously elected a Benchler, in the place of Mr. Hodgins, resigned.

The report from the Solicitor to the Society referring to the cases of Attorneys and Solicitors in arrears with their annual fees, was presented, in accordance with Mr. Irving's motion of Michaelmas Term, last,

Ordered, That Mr. Ferguson be appointed a member of the Library and the Legal

LAW SOCIETY, HILARY TERM.

Education Committees, in the place of Mr. Hodgins, resigned.

FEBRUARY 7th, 1880.

The report of the Legal Education Committee on the case of A. B. Ford, recommending that his petition be granted, was adopted.

A letter from Carswell & Co., in reference to the printing of the Reports, was read and referred to the Committee on Reporting for enquiry and report with suggestions for improvements in the system of reporting.

The petition of Messrs. Perdue and Rolph, the Chamber Reporters, and the report of the Committee on Reporting, were received and read.

Ordered that the salaries of the Chamber Reporters be fixed at \$300 per annum each, to commence on the 1st instant.

The report of the special committee on the case of Mr. J. C. Dalrymple, was received and read.

Ordered, That Mr. Dalrymple be called to the Bar.

The report of the Committee on Discipline on the letter of Mr. Hutchinson was adopted.

The letter of Mr. Holmsted, Registrar of the Court of Chancery, and the certificate of the taxing officer in reference to certain proceedings in the suit of *Austin v. Terry* were read.

Ordered, That the papers be referred to the Committee on Discipline for enquiry and report.

The report of the Finance Committee was taken up.

Eighth clause as to survey and plan of Osgoode Hall property.—Carried.

Eleventh clause as to prevention of theft of articles of clothing from the Hall, and the appointment of a hall porter was referred to the Library and Finance Committees to confer upon and report.

The estimates for 1880 were read by the Chairman of the Finance Committee, and considered.

Mr. Irving moved the adoption of the estimates of the Library Committee.—Carried.

The report of the Finance Committee as to the first year's grant to the Hamilton Association was considered and adopted.

Mr. Leith moved that the seventh edition of Arnot's Elements of Physics, by Bain & Taylor, and Somerville's Physical Geography, be substituted for the German works as subjects for examination in the primary examinations.—Carried.

The yearly balance sheet, with details of the amounts disbursed and received for 1879, as audited by the Auditor, were laid on the table.

Mr. Mackelcan moved that the statement in detail of receipts and expenditure for 1879 be printed, and furnished to each member of the Law Society, in accordance with the statute.

Mr. Crickmore moved the following rule, That a fee of one dollar be paid for each Certificate of Admission of a Student-at-Law, issued to such student, and a fee of two dollars for each Diploma of Barrister-at-Law, issued to such Barrister. Carried.

Mr. Crickmore presented the Report of the Committee on Legal Education on the subject of restoring the Primary Examination in Easter and Trinity Terms, and moved the following rule, That Primary Examinations for Students-at-Law be held in each Term during the year. Carried.

The Report of the same Committee on the curriculum was taken up and considered, and Mr. Crickmore moved a rule in accordance therewith, which was carried.

Mr. Crooks gave notice that he would move for the reconsideration and passing of the following resolution, proposed during last Term, but which did not then carry, namely:—

Resolved, That this Society do apply to the Legislature for authority under which, and subject to such rules as the Society may adopt, the Society may permit any person who has obtained the degree of Bachelor of Laws in the University of Toronto, or other College possessing University powers in this Province, and after having passed such examination, and complied with such other conditions as the Society may prescribe, to be called to the Bar and admitted as an attorney after a period of four years'

LAW SOCIETY, HILARY TERM—PRESUMPTIONS IN CRIMINAL CASES.

study or service under articles, as the case may be, which period may have elapsed either before, or concurrently with, the passing of the examinations for such degree.

Mr. Meredith moved, That the Reports, including the back numbers of the current volume, at the time of formation, be supplied to each County Library Association formed under the Rule in that behalf. Carried.

Mr. Maclellan moved, That Mr. Ferguson be added to the Select Committee to consolidate the rules and regulations of the Society.

FRIDAY, February 13th.

The papers of Mr. Jacobs, an attorney of ten years' standing, were laid before Convocation. Mr. Read moved, That a committee, composed of Mr. Leith, Mr. Ferguson, and the mover, be appointed to examine Mr. Jacobs. Carried.

The Report of the Library Committee was received, read and adopted.

Mr. Crooks moved the resolution, notice of which had been given on the 7th instant. On a division the motion was lost.

The Report of the Committee on Discipline on the case of a member of the Bar which had been referred to them by Convocation, was received, read and adopted.

Mr. McCarthy moved, that the conduct of Mr. —, a Law Student, as stated in the foregoing report, be referred to the Discipline Committee for consideration and investigation. Carried.

The Committee on Discipline, in accordance with the above motion, withdrew, for the purpose of carrying on the investigation ordered.

The special Committee appointed to examine Mr. Jacobs, reported that he had passed his examination satisfactorily.

Ordered, That he be called to the Bar.

The Committee on Discipline reported on the case of the Student-at-Law referred to them, and their report was adopted.

Mr. Jacobs was called to the Bar.

A second letter of the Registrar of the Court of Chancery was read and referred to the Committee on Discipline.

A petition from Mr. Mills on the subject

of his fees was referred to the Finance Committee with power to act.

In the matter of the Law Student reported upon by the Committee on Discipline, as before stated, it was ordered, that the matter be referred to the same Committee to consider and report what punishment can, and ought, to be inflicted in the premises. The Committee to report next Term. Convocation adjourned.

SELECTIONS.

PRESUMPTIONS IN CRIMINAL CASES.

The first enquiry before us, when entering on the discussion of presumptive proof, is that which relates to what is called "circumstantial" as distinguished from what is called "direct" evidence. Is there any "direct" evidence that is not "circumstantial"?

One of the simplest cases of what is called "direct" evidence, is that of a witness who testifies that he saw a particular person at a particular time. Let us note the several elements of incertitude in such a statement:

1. *The percipient powers of the witness may be defective.* We have heard lately a good deal about colour-blindness, and it is stated, on high scientific authority, that about eight per cent. of men are deficient in the capacity of distinguishing green from red. No man, it is urged, should be appointed to any position in which it is important to decide upon particular colours, *e.g.*, no man should be appointed sailing officer of a ship, or switch-tender on a rail road—without being first examined as to his capacity to distinguish colours. But is there not, with some persons, a want of capacity to distinguish faces? Is not this capacity, in other words, very unequally distributed? General Scott, it is said, used to be able to remember every soldier with whom he had any personal acquaintance; and of a great English politician, the first Duke of Wharton, it is stated, that on his annual electioneering campaign, which extended over three or four counties, he would not only remember the face of every voter whom he had previously met, but

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knew when to ask whether the boy of one of them, born five years before, was yet in breeches, or whether the daughter of another, born a little earlier, was yet out of school. If there should be these variations in the capacity for distinguishing likenesses, and in individuating family incidents, it is not strange that this capacity should be in some persons all most absolutely suspended, and in others should become morbidly active. If so, we can understand how it is that we have so many extraordinary negations of identity, and so many equally extraordinary affirmations of identity. Two witnesses, one peculiarly dull in the exercise of this perception, the other peculiarly acute, are looking on at a riot, such as that led by Lord George Gordon, or that in Philadelphia in 1844, in which a series of Roman Catholic churches were burned. A man is seen figuring conspicuously in setting fire to a building. The flames cast a distracting light on his face, so as to exhibit it vividly, and yet at the same time in new and flickering expressions. The obtuse witness does not see in him a likeness to anybody. The witness gifted with an acute perception of likenesses, sees in him one, if not two, persons whom he had seen before.

"I cannot see the speaker, how with you?"
 "Not see the speaker? Why I now see two."

Such was a supposed colloquy between Pitt and Dundas when, after a dinner in which each had taken too much portwine, they entered the House of Commons. The excitement had produced contrary effects; the one could see nobody at all in the chair; the other saw two persons instead of one.

May we not, in view of what we call *face-blindness*, or, in other words, in view of the occasional abnormal distribution of the faculty of detecting likenesses, explain what is otherwise inexplicable both in history and in jurisprudence? "The popular belief at Rome," says Macaulay, "seems to have been that the event of the great day of Regillus was decided by supernatural agency. Castor and Pollux, it was said, had fought, armed and mounted, at the head of the legions of the commonwealth, and had afterwards carried the news of the victory with in-

credible speed to the city." * *

"How the legend originated cannot now be ascertained; but we may easily imagine several ways in which it originated: nor is it all necessary to suppose, with Julius Frontinus, that two young men were dressed up by the dictator to personate the sons of Leda." St. James was in like manner seen charging at the head of more than one Spanish army, and Whalley, the regicide, appeared more than once as a supernatural ally among the Puritan soldiers, in their early conflicts with the Indians.

In the court room these abnormal conditions of the perceptive powers have been frequently illustrated. After the disappearance of Dr. Parkman, when public curiosity was greatly strained on the question whether he had been seen after the day on which it was alleged he had been murdered, several entirely honest witnesses were convinced that they had seen him in some of his old haunts at the time when, there is now no question, he was dead. Numerous have been the persons who, since the disappearance of Charlie Ross, have honestly declared that they recognised the lost child in places so remote from each other, and at times so close, that it is clear that some of them, at least, were mistaken. The same remarkable aberration of the perceptive powers was illustrated in the trials consequent on the Lord George Gordon riots, and on the Philadelphia riots in 1844, already noticed. In each of these cases the collisions were brought about by intense religious animosity. There was a conviction among certain classes of Protestants, and especially among those from the north of Ireland, that the Roman Catholics were about to rise to murder the foes of their Church, and that certain well-known and conspicuous Roman Catholics were to be foremost in the work of blood. There was a conviction among certain classes of the Roman Catholics that certain prominent Protestant leaders were engaged in preparing for a slaughter of Roman Catholics, and the destruction of Roman Catholic churches. When the leading rioters were tried, it is remarkable how ubiquitous these champions, on both sides, are sworn to have been, and yet at the same

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time what vanishing properties they appear to have possessed. In the Philadelphia case, for instance, when the Protestant rioters were on trial, witnesses from the opposite ranks were found in abundance to testify to the activity of certain leading Protestant agitators in the fray; which participation was negatived by witnesses for the defence. The same condition of things was exhibited when the Roman Catholic Rioters were on trial; and it was noticed that one prominent and very obnoxious Roman Catholic alderman was sworn to have been conspicuous in so many distinct operations of mischief, that this very multiplicity of inconsistent employments gave strong corroboration to the testimony of his friends that during the whole of the riots he kept quietly at his home. The same observation may be made as to the English prosecutions of the Roman Catholics, under the auspices of Titus Oates. That Oates knowingly perjured himself there is no question. But there were other witnesses for the prosecution whom we cannot so readily dispose of, as they were persons whose honesty of purpose, whatever we may say of their susceptibility to excitement, was unquestioned and unquestionable. The only solution is that here proposed—weak capacity for the perception of identity, acted on by powerful distorting prejudices. The mental eye, never very accurate, is overstrained. It is feared, or hoped, or even believed, that a particular person will be in a particular place. Somebody else is converted into that particular person.

Are such transmutations or idealizations of appearances dependent upon public excitement, as in the cases just mentioned? It would be fortunate for public justice if they were, since in this way our distrust would be limited to cases which involve public excitement. But so far from this being the case, we find that the same deranging and transmutive influence is exercised, on many minds, by an intense personal longing. There are few impostors, striving to seize upon some vacant chair in a desolate household, that have not had at least some sort of temporary recognition of this class. We have before us a French trial,

of which the basis was the disappearance of a young girl from a peasant's home. Two years afterwards, a girl, much resembling the lost child, made her appearance in the neighbourhood, and was greeted by some of the neighbours as the lost child re-appeared. The new-comer, not originally an impostor, but under the influence of one of those not unfrequent physical conditions in which self-deceit and epidemic delusion mingle, assumed the part thus assigned to her, and appeared in the bereaved home. The strangest part of the procedure was that she was welcomed by the family as really the person she claimed to be; and it was not until months had passed, and a series of counter recognitions sprang up from the family to which she really belonged, that the delusion was dispelled.

Lady Tichborne's recognition of the claimant as her lost son is a more familiar illustration of the same phenomenon. Her vision had been for years strained in one pursuit, that of the boy whom she reproached herself with having treated capriciously, and who had sought, in another continent, the home of quiet which he had been denied in his mother's house. She was prepared to receive in the vacant seat any one who had any plausible claim to it. She could not believe her child was dead. She was ready to seize upon any trifling indication that pointed out the claimant as her child. Certainly the claimant was very different from what her child would probably have been had he lived. But she eagerly desired that he should prove to be her child, and what she eagerly desired she believed. Of her honesty, there can be little doubt. There can be little doubt, also, that her perceptive powers had become so distracted by this morbid and passionate longing, and by this prolonged belief in his re-appearance, against all probability, that her recognition was a delusion.

There is also an instinctive tendency in many minds to see a person in a place with which he has usually been associated. The effect of this, in its most unshackled operation, we observe in dreams, in which we fill familiar scenes with persons whom we recollect as having in former times occupied them, no matter how long those persons may have been in the grave. Of

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the operation of this delusion we have had several illustrations in forensic investigations, "Who did you see at the bank at the time?" is a question asked a witness on a prosecution against a bank clerk for embezzlement. "I saw A, B and C, at their respective posts." Now it turns out that A was not at the bank on the particular day, and the testimony of the witness is impeached on the ground, "*falsus in uno, falsus in omnibus*." Yet the witness testified only what he really believed; and what is more, it is impossible for us to scan any long piece of testimony descriptive of a particular scene without finding in it one or more similar cases of filling in of details. In other words, when we recall an incident, we recall its usual conditions. In this way we can explain some of the conflicts as to identity. A, half awake, hears a noise like that of a burglar at an outside door. B, a suspected burglar, is known to be prowling about the neighbourhood, and on looking out of the window, amid shifting shadows, or perhaps in the person of a visitor haunting covertly, though not burglariously, the kitchen, A imagines he sees B. B's friends, however, are accustomed to see him in a particular alehouse at this hour, in which he is as much of an institution as the chair on which he sits. Some one of them looks in at the door at the usual hour, sees the group collected, and fills it up with its usual ingredients. Both A's testimony and that of the looker-in at the ale-house, turn out to be untrue. B was neither at the house of A, at the time, nor was he at the ale-house. Yet both witnesses testified only to what was an honest belief.

2. *There may be wilful perjury.* In some relationships, to certain classes of minds, perjury may be what Bacon called revenge, a sort of wild justice. Two years ago, the *London Quarterly Review*, a journal not among those distinguished for an advocacy of loose morals, when reviewing Lord Melbourne's life, and on commenting on Lord Melbourne's repeated assertions of Mrs. Norton's innocence of the criminal relations to him with which she was charged, told us that "according to the received code of honour when a lady's reputation is concerned," she is to be sworn out of difficulty by her paramour;

and we are elsewhere told that it is as much a part of the profession of a man of gallantry to perjure himself in court in order to get rid of the consequences of a seduction, as it is to perjure himself to his victim in order that the seduction may be accomplished. And in the *Quarterly Review* such oaths are likened to that of "the loyal servant, who, in 1716, when twitted with having sworn falsely to save Stirling of Kerr's life, said he would rather trust his soul with God than his master's life with the Whigs." If we should judge from some of the recent English election cases, we might conclude that this preference still continues, and that the reluctance to trust a master's soul to Tories is as great as is the reluctance to trust a master's soul to Whigs. Bribery disqualifies; bribery is an indictable offence; bribery is shown to have been lavishly employed; but the agent who employs it is a Mr. Smith or a Mr. Jones, who never was heard of before or after the election, whom nobody on either side employed, and whom nobody on either side knew. And in our own inquiries into questions of bribery, the identity of the persons bribing is either clothed in the same mystery, or, when certain persons are identified as being concerned in the illegal act, these persons uniformly swear they know nothing about it. So generally is this the case that it is now recognised that no case of bribery can be proved, unless (1) by some one of the parties having some great pecuniary or political inducement to disgrace his associates; (2) by some innocent bystander fortuitously hearing part of the transaction; or (3) by extrinsic facts from which a case of guilt can be inferred. Nor is it in election transactions, or partisan strifes, or adulteries, alone, that there is this temptation to perjury. There is no imaginable attitude in which a witness can be placed in which he is not more or less tempted to testify to that which is false.

Are we, however—such is the natural inquiry which presents itself—to reject all testimony as tainted, and fall back upon a sort of legal agnosticism? By no means. The conclusion, indeed, is that there is no fact that can be demonstra-

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ted, because there is no witness, the truth of whose statements is not dependent for credibility more or less upon his character, his capacity and opportunities for observation, his freedom from prejudice. In other words, to take up again the question of identity, which we have here selected as the simplest to which our attention can be turned, when a witness says, "I saw A at a particular place, at a particular time," this statement is circumstantial, because it depends upon the intelligence, fairness, and means of observation of the witness.

3. We have just been dwelling on what may be called the *subjective* factor in credibility. We now turn to the *objective* factor. *There may be two persons so apparently alike as to deceive an ordinary observer.* In the Tichborne prosecution, not only do we encounter a number of witnesses confident that the claimant was Roger Tichborne, but there was a mass of testimony to the effect that the claimant was a third person, not Arthur Orton, who he probably really was, but Castro, an Australian bushman, who was certainly neither Orton nor Tichborne. And though cases of close similarity among living persons are very rare, such is far from being the case with the dead. It is extraordinary how much confusion there is as to the identity of the remains of persons only recently deceased. Among the sad incidents of the morgue, not the least sad is the way in which, sometimes, several distinct relationships are set up for one corpse. Two or three women have been known to swear positively, and apparently honestly, that a particular body was that of a deceased husband. We are not without illustrations of the same confusion in our forensic history. In Udderzook's case,* one of the most striking in the records of disputed identity, the deceased was killed in reality, in order to perpetrate an insurance fraud, after having previously been killed by proxy, a dead body, dressed in his clothes, being slipped into a shop where he was working, and which was then set on fire. The false corpse was identified by several witnesses as being that of the living man, while the real corpse was afterwards de-

nied by other witnesses to be his body after he was dead. Nor is this strange. In the period which immediately succeeds death,

"Before decay's effacing fingers
Have swept the cheek where beauty lingers,"

expressions previously unrecognized start out, while others previously recognized, recede.

We must remember, also, that in most cases of crime, persons whose identity is afterwards disputed rarely appear in broad daylight. The burglar can only commit burglary in the dark; and if he is seen at all it is under confusing shadows, or in the reflected light of a dark lantern. Disguises, also, are employed, which, in the late case of the Northampton bank robbery, leave the voice as the only means of detection. The assassin is ready, if he can, to adopt another dress, and to imitate another's gait and manner; and cases are reported in which the person assailed, believing that one with whom he was at enmity had perpetrated the offence, was clinched in the belief by the fact that the appearance of the supposed enemy was imitated by the real assailant. There may be, also, a mistake as to time, by means of which an *alibi*, true in everything but date, may be constructed. Of this we have an illustration in a recently-reported English trial. Two men were indicted for burglary on the night of Sunday, October 21st, 1878. Strong proof was adduced against them in the shape of the testimony of four separate witnesses, three of whom identified them as coming from the house in which the burglary was committed, and the other of whom believed that he saw them when a little further on their road. This case was met by the testimony of twelve witnesses, chiefly relatives and friends, who swore that during the whole evening in which the burglary was committed the defendants were in their own home, where they lived together, being brothers-in-law. The witnesses so produced went into a great mass of details, the whole testimony forming so consistent a narrative that the more minute and the more ramified became the cross-examination, the more unassailable did their statement become.

* Reported in Whart. on Hom., app.

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There was only one way of evading the effect. Their story could be pierced only at one point—at the time at which it touched the time of the burglary. All the incidents to which they referred might be true, and yet they might not have occurred on the evening of Sunday, October 21st. Though they must have occurred, judging from their internal coherence, on some other Sunday near that time. To test this, they were examined as to the state of the weather on October 21st. They united in swearing that it was rough, stormy and dark. An almanac was sent for, from which it appeared that the moon on that night was full. This was the only evidence at hand to sustain the hypothesis of a change of dates, and the defendants were acquitted. Yet it afterwards appeared that all the incidents on which the *alibi* was based had been transferred from the night of October 14th to that of October 21st. It was the night of Sunday, October 14th, that was rough, stormy and dark. There could have been no doubt that on that night the defendants were at their home, and were there seen by the twelve witnesses produced on the trial, and that it was then that the various things were seen and heard which were detailed by the witnesses with such harmonious minuteness as to defy cross-examination. But that the defendants should have been at home on Sunday, October 14th, was in no way inconsistent with their being out house-breaking on Sunday, October 21st.*

It may be said that here again is scepticism, with the difference that, while under the last head, the scepticism to which we were led was scepticism as to the subject, *i. e.*, scepticism as to whether any witness is to be believed, now it is scepticism as to the object, *i. e.*, scepticism as to anything testified to really exists. The answer is that the only scepticism here invoked is the scepticism which is incident to whatever is credible, and without which nothing that is incredible, in the moral sense, can exist. It is not necessary here to appeal to Lessing's famous saying, "if absolute truth were offered to me on the one side, and pro-

bable truth on the other side, I should say, in all humility, give me the probable,"—for in this matter we have no choice. We cannot apprehend the absolute if we would. We can only, as to matters actual, as distinguished from matters ideal, reach approximate truth. We know, for instance, that a straight road is the shortest distance between two geographical centres, but this is a truth which, absolute as it is, cannot be illustrated in perfect exactness in any road over which we travel. When it is stated, for instance, that between Baltimore and Washington a particular road is straight, then we have a statement which may be approximately true, but which we know is, in some respects, false. Of the impossibility of perfect accuracy in human testimony, as to matters we might suppose to be the most susceptible to demonstration, we have a remarkable series of illustrations in a trial which took place in Massachusetts some few years ago, and in which the issue was whether a certain signature had been forged by tracing it over a signature that was genuine. On the one side, several of the most eminent microscopists in the land swore positively that under the ink they discovered pencil tracings. On the other side, about as many equally eminent microscopists swore just to the contrary. It became important, also, to determine whether the two signatures, comprising sixteen letters, coincided. A distinguished professor of mathematics, occupying the chief chair in his department in one of the chief universities of the land, swore that the probability that such a coincidence could be produced otherwise than by superimposition was 1 to 2,666,000,000,000,000,000,000. To rebut this testimony a series of signatures, taken at random from those of John Quincy Adams and other men of equally marked hand writing, were produced, in which it was sworn that there were numerous cases of entire coincidence.* We have to conclude, therefore, that from even the most exact and competent witnesses, and as to topics particularly capable of demonstration, absolute truth cannot be established on any question

See 17 Alb. L. J., p. 40.

* See 4 Am. L. J. 625.

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touching practical life. High probabilities so high as leave us beyond reasonable doubt, but never absolute certainties, are the strongest proof that can be produced.

It follows, then, that of no conclusion can we obtain, in a court of justice, any evidence which does not consist of a series of circumstances. In other words, we infer certain conclusions from a series of facts. This series of facts may be apparently very simple, as where A says he saw B shoot C. Yet these apparently simple and "direct" cases, as they are called, are after all the most complex and most dependent on collateral circumstances for belief. Establish three or four of what are called extraneous facts: the finding of C's dead body, with wounds inflicted by a weapon shown to belong to B—the discovery of blood and of hair, identified with that of C, on B's clothes—the ferreting out of C's money, secreted in places over which B had exclusive control—the coincidence of B's feet with prints found on the soil near the spot of the killing—B's flight without explanation—and you have a strong case on which a conviction can rest. But limit your case to A's testimony that he saw B kill C, and you have to draw in a multitude of collateral facts before you can convict. Independently of the *corpus delicti*, which must be established, you have to make out the credibility of A. It is true that credibility is *prima facie* assumed until it is impugned on the opposite side. But, independently of such direct discredit, there is no witness that is produced as to whom multitudes of presumptions, based upon manner, self-consistency, objective probability, do not arise. On the testimony of a perfectly impersonal witness—if we could conceive such—of a witness who would give rise to no such presumptions, and invoke no circumstances, intrinsic or extrinsic, for his credit, no conviction could be had. Hence, that which is called the most direct testimony is often the most circumstantial. It rests upon the credibility of the witness and the credibility of the thing testified to, each of which may depend upon many complex conditions.

PRESUMPTIONS ARE INFERENCES FROM FACTS TO FACTS.

All evidence, therefore, we conclude, consists of reason and fact co-operating as co-ordinate factors. The fact is presented to us either by inspection, or by what we call judicial notice, or by our knowledge of every day life, such as is embraced by the term "notoriety," or by the descriptive narrative of witnesses. From these facts we draw certain conclusions. The mode by which we draw them is inductive, and the process we term *presumption*. In other words, a presumption is an inference of a fact from a fact. Of this we may take the following illustrations.

A man accused of crime hides himself and then absconds. From this fact of absconding we infer the fact of guilt. This is a presumption of fact, or an argument of a fact from a fact.

Stolen money is found on the defendant's person, and of this he gives no satisfactory explanation. Here, also, we infer the fact of guilt from the fact of unexplained possession of the stolen money.

"An enemy has done this." The cattle of a farmer are found one day injured so systematically and cruelly, that we can attribute the act only to the settled, malignant purpose of a cowardly enemy, A is such an enemy and we infer that he did the deed. The inference is far from being enough to convict if taken by itself; but it is valuable as one of a series of cumulative inferences. It consists of a presumption of fact—in other words, of an inference from the fact of cowardly hatred to the fact of guilt.

PRESUMPTIONS VARY IN FORCE WITH PROBABILITY.

Presumptions, therefore (limiting ourselves, of course, to presumptions of fact, and reserving the consideration of presumptions of law), vary in intensity in proportion to the probabilities they involve. We may illustrate this position by the presumptions, all of them (exclusive of those springing from his personal conduct) resting on extrinsic facts, on which Dr. Webster's conviction was based.

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Some of these may be marshalled as follows:

1. The homicide was committed by someone at the time in Boston. Boston contained then, we may say by the way of rough estimate, 150,000 residents. A was resident in Boston that night. Therefore it is, on the face of things, 1 to 150,000 that A was concerned in the homicide. But there are many considerations which tend greatly to reduce the number of 150,000, the basis for inductions in this respect. We must take into account, in such cases, the antecedent probability of the conclusion. We must take into consideration, also, all conflicting probabilities. How many of the 150,000 residents of Boston were incapacitated at the time, by infancy, sickness, or other disability, from perpetrating the act? To how many others would the imputation of the act be morally and physically absurd.

2. The homicide was committed by some one with a motive. This, of course, is a proposition not universally true. Some homicides have undoubtedly been motiveless. Sudden incursions of homicidal mania have, in certain very rare instances, swept down upon individuals abnormally constituted in such a way as to make them the irrational instruments of a fierce destructive purpose. But these rare cases are generally distinguished by violent and uncontrollable scenic outbursts. No instance is on record in which they have been executed with the stealth and secrecy by which the killing of Dr. Parkman was marked. If, therefore, we have to assume that the murder of Dr. Parkman was committed by a person who had a motive to destroy him, we limit very much the ranks of those among whom the probable perpetrator is to be sought. Among motives we may mention the following:

Old grudge.—Who, likely to avenge it, bore an old grudge to the deceased?

Jealousy.—Of a man of Dr. Parkman's character and habits, is it probable that anyone could be instigated by this passion?

Expectation of plunder.—Is it likely that the dead man could have been entrapped into a place where he could readily have been killed by one of that

desperate class by whom the docks and alleys of great seaports are infested?

Interest in getting the victim out of the way.—Was it the interest of anybody to remove him? Were there unprincipled heirs, whose access to fortune would be accelerated by his death? Had he debtors who would be relieved by his death?

Sudden passion.—Who is there among those with whom Dr. Parkman came in collision, who might have been stung into sudden passion by irritating conduct on his part; who would have been likely to let this passion wreak itself in a fatal blow; who would have had the skill afterwards to hide the body so as to evade immediate detection?

3. Supposing the homicide not to have been committed in a spot remote from Dr. Parkman's usual haunts, it must have been by a person capable of concealing its track, and of employing effective agencies by which the body of the deceased man could be removed from sight.

4. Consciousness of guilt is apt to betray itself, involuntarily, in attempts to evade justice; in feverish and restless interpositions in the action of the officers of justice who are seeking to ferret out the author of the crime; in tremour when charged with the offence; in efforts, not always cool or prudent, to throw suspicion upon others. It is true, as we will presently see, that conduct of this class is not an invariable associate of guilt. But when we notice a person engaged in a train of conclusive efforts to evade a charge of crime, and to throw the opprobrium elsewhere, we may say that he is probably concerned in the guilt whose imputation he makes such strenuous and unscrupulous efforts to repel.

5. Can we trace the property of the deceased into the hands of a suspected party? If so, and this possession is unexplained, this leads to the probability of the party charged being concerned in the homicide.

6. Are the remains of the dead man shown to have been at any time under the control of the accused? It is true, if so, they may have been placed there surreptitiously, without his knowledge, or brought there for the purpose of *post-mortem* experiment. But even making

PRESUMPTIONS IN CRIMINAL CASES.

these allowances, the fact, if established, is strongly inculpatory.

This brings us to the position that a conclusion, in all legal investigations, is based on a cumulation of probabilities. How these probabilities are to be marshalled is thus exhibited by one of the highest modern authorities in this line :

"The truth of a conclusion may be regarded as a compound event, depending upon the premises happening to be true ; thus, to obtain the probability of the conclusion, we must multiply together the fractions expressing the probabilities of the premises. Thus, if the probability is $\frac{1}{2}$ that *A* is *B*, and also $\frac{1}{2}$ that *B* is *C*, the conclusion that *A* is *C*, on the ground of these premises, is $\frac{1}{2} \times \frac{1}{2}$, or $\frac{1}{4}$. Similarly if there be any number of premises requisite to the establishment of a conclusion and their probabilities by *m*, *n*, *p*, *q*, *r*, &c., the probability of the conclusion on the ground of these premises is $m \times n \times p \times q \times r \times \dots$. This product has but a small value, unless each of the qualities *m*, *n*, &c., be nearly unity.

"But it is particularly to be noticed that the probability thus calculated is not the whole probability of the conclusion, but that only which it derives from the premises in question. Whately's* remarks on this subject might mislead the reader into supposing that the calculation is completed by multiplying together the probabilities of the premises. But it has been fully explained by De Morgan† that we must take into account the antecedent probability of the conclusion ; *A* may be *C* for other reasons besides its being *B*, and as he remarks, 'It is difficult, if not impossible, to produce a chain of argument of which the reasoner can rest the result on those arguments only.' We must also bear in mind that the failure of argument does not, except under special circumstances, disprove the truth of the conclusion it is intended to uphold, otherwise there are few truths which could survive the ill-considered arguments adduced in their favour. But as a rope does not necessarily break because one strand in it is weak,

so a conclusion may depend upon an endless number of considerations besides those immediately in view. Even when we have no other information we must not consider a statement as devoid of all probability. The expression of complete doubt is a ratio of equality between the chances in favour of and against it, and this ratio is expressed in the probability $\frac{1}{2}$.

"Now if *A* and *C* are wholly unknown things, we have no reason to believe that *A* is *C* rather than *A* is not *C*. The antecedent probability is then $\frac{1}{2}$. If we also have the probabilities that *A* is *B* $\frac{1}{2}$, and that *B* is *C* $\frac{1}{2}$, we have no right to suppose that the probability of *A* being *C* is reduced by the argument in its favor. If the conclusion is true on its own grounds, the failure of the argument does not affect it ; thus its total probability, added to the probability that this failing, the new argument in question established it. There is a probability $\frac{1}{2}$ that we shall not require the special argument ; a probability $\frac{1}{2}$ that we shall, and probability $\frac{1}{2}$ that the argument does in that case establish it. Thus the complete result is $\frac{1}{2} + \frac{1}{2} \times \frac{1}{2}$, or $\frac{3}{4}$. In general language, if *a* be the probability found in a particular argument, and *c* the antecedent probability, then the general result is $I - (I - a)(I - c)$, or $a + c - ac$.

"We may put it still more generally in this way : Let *a*, *b*, *c*, *d*, &c., be the probabilities of a conclusion founded on various arguments or considerations of any kind. It is only when all the arguments fail that our conclusion proves finally untrue ; the probabilities of each failing are respectively $I - a$, $I - b$, $I - c$, &c. ; the probability that they will all fail $(I - a)(I - b)(I - c) \dots$; therefore the probability that the conclusion will not fail is $I - (I - a)(I - b)(I - c) \dots$ etc. On this principle it follows that every argument in favour of a fact, however flimsy and slight, adds probability to it. When it is unknown whether an overdue vessel has foundered or not, every slight indication of a lost vessel will add some probability to the belief of its loss, and the disproof of any particular evidence will not disprove the event."—*Jevons' Principles of Logic*, I., 239.

* Elements of Logic, Book III., sections 11 and 18.
† Encyclopædia Metrop., art. Probabilities, p. 400.

PRESUMPTIONS IN CRIMINAL CASES.

PRESUMPTION OF INTENT.

Such being the general characteristics of presumptions of fact, I proceed to notice specially some of the most prominent among these presumptions, and the first that strikes the eye is the presumption, as it is called, of intent. The first criticism here to be made is that in setting up this presumption we pass from the sphere of inductive reasoning and enter upon that of deductive; and, in so doing, depart from the true field of practical jurisprudence. The syllogism presented to us is as follows:

"Whoever does an act, intended it:
A did this act;
Therefore he intended it."

But the major premise, like all other universal and absolute statements involving human action, is untrue. Acts are so far from being always intended by those to whom they are imputable, that in a large number of cases they are unintended. Negligent offences are perhaps more numerous, and at the same time more varied, than intended offences. For one effect produced by us which corresponds to our intent, there may be a dozen which do not correspond. A telegraph operator may delay for half an hour forwarding a message. His intent, we may presume, is to get his dinner when it is ready. But this delay may produce a multitude of unintended injuries. It may discompose a whole system of railroad connections, so that in some remote spot, of which, perhaps, the operator may have never thought, a collision may occur. It may prevent innumerable appointments from being fulfilled; it may cause innumerable injuries to persons or property on the wide system of roads it affects. The negligence, in fact, usually operates on a far wider surface than the wilful act, simply because the wilful act is usually insulated and intrusive, while the negligence is an omission in the performance of one of a long series of interdependent duties, of which, when one falls all fall. But between negligence and malice there is this fundamental distinction: the first is a lack of intent, arising from intellectual defect; the second is a bad intent, arising from moral defect. It

is of the essence of malicious offences that they are intended; it is of the essence of negligent offences that they are not intended. Of the majority of cases in which one man invades the rights of another, we may safely say the injury, in the form it was perpetrated, was unintended. As to a majority of the cases covered, therefore, by the proposition before us, it is false.

We must also remember, in further illustration of the conclusion just stated, that there are few cases in which the object intended, even among what are called malicious crimes, is actually effected. A number of scholastic distinctions have been taken in this relation, and have been considered by me elsewhere. It is sufficient, at present, stripping them of their technical forms, to notice some of the more prominent.

1. An unintended object may fortuitously intervene between a blow aimed and the person intended to be hurt. A, for instance, shoots at B. After the pistol is aimed, and at the moment of its discharge, A's child suddenly darts in the way. The killing of A's child, so far from being intended by A, is of all things the most abhorrent to him.

2. B is struck by A when mistaken for C. Here A intends to strike B, but intends to strike him under a mistake of person. The intended object is hit, but the object is invested with wrong attributes, and is aimed at under the false belief that it possesses these attributes. A, for instance, as in Levett's case, shoots at a casual visitor, B, imagining B to be a burglar. Or A shoots at his child, B, imagining the child to be an enemy whom he designed to kill. Here there is no intention to kill B, as B really is, though there is an intention to kill some one whom B is supposed to be.

3. Or an act may be from a contingent intent. A shoots at B, knowing that B is in a place (*e. g.*, a railway carriage), in which other persons are sitting. A knows that he runs the risk, when shooting at such an object, of killing another person than the one at whom he aims. He kills C, sitting next to B. Undoubtedly he may be regarded as embracing C within the scope of his purpose. But, nevertheless he did not intend to kill C, and would

have avoided the contingency of so doing if he could have done so without abandoning his purpose of killing A.

4. The victim is not mistaken for another, nor killed fortuitously, nor killed incidentally to the attempted killing of another, but killed because he is falsely supposed to be an enemy, or falsely supposed to have property on him which can be readily appropriated by the assassin, or falsely supposed, as in the remarkable case of the murder of White by Crowninshield, to stand in the way of an inheritance.

(To be continued.)

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

From Q. B.] [March 27.]

SOWDEN V. STANDARD.

Insurance Agent of Company acting for insured—Misdescription.

At the foot of an application for insurance on a block of five buildings, under one roof, there was above the signature of the applicant an agreement, declaration and warranty that if the agent of the Company filled up the application, he should in that case, be the agent of the applicant, and not that of the Company.

The plaintiff signed a printed form of application in blank, which he gave to the agent, telling him to examine the buildings and fill it up. This the agent did from an examination and diagram of the buildings which he had made on a previous occasion; and in answer to the question, "Is there any other fact or circumstance affecting the risk which it is necessary the Company should be made acquainted with?" he answered, "No, it is a first-class building in every respect; although one roof covers all, there is a solid brick fire wall between each store."

There was not, as a fact, such a wall, and the jury found that there was a misdescrip-

tion and misstatement of a fact material to the risk.

Held, affirming the judgment of the Queen's Bench, that the plaintiff could not recover.

Robinson, Q.C., for the appellants.

Bethune, Q.C., for the respondents.

Appeal dismissed.

From Proudfoot, V.C.] [March 27.]

MOFFATT V. BOARD OF EDUCATION OF
CARLETON PLACE.

*Specific performance—School Trustees—
Change of school site.*

Held, affirming the judgment of Proudfoot, V.C., that a contract for the purchase of land for the purpose of changing the site for a school by the Board of Education was *intra vires*, although the Council had passed no by-law authorising the purchase, nor had the Governor in Council approved of the change—and the plaintiff was therefore enabled to call for specific performance of the agreement for purchase.

Hodgins, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

Appeal dismissed.

From Proudfoot, V.C.] [March 27.]

CANNON V. CORN EXCHANGE.

*Incorporated Society—Expulsion of member—
35 Vic., c. 45, s.*

Held, affirming the judgment of Proudfoot, V.C., that the plaintiff was illegally expelled by the defendants.

Per BURTON and PATTERSON J.J., on the ground that there had been no refusal to arbitrate.

Per GALT, J., the plaintiff was expelled contrary to by-law 3, as no meeting was called in compliance therewith to consider his expulsion.

Robinson, Q.C., and Ferguson, Q.C. for the appellants.

McMichael, Q.C., and Boyd, Q.C., for the respondents.

Appeal dismissed.

C. of A.]

NOTES OF CASES.

[C. of A.]

From Proudfoot, V.C.]

[March 27.]

ATTORNEY-GENERAL V. O'REILLY.

Escheat—Jurisdiction.

Held, affirming the judgment of Proudfoot, V.C., that the law of escheats applies to land in this Province; that the escheat belongs to this Province, and not to the Dominion; that no inquisition of office is necessary, and that the Court of Chancery is entitled to entertain a suit by the Attorney-General to enforce the escheat.

W. Macdougall for the appellants.

J. D. Edgar and *Cartwright* for the respondents.

Appeal dismissed.

From C. C. Stormont, &c.]

[March 27.]

RE BARRETT.

Insolvent Act, 1875—Power of Assignee to avoid chattel mortgage.

Held, BURTON, J. A., dissenting, affirming the judgment of the County Court, that an assignee in insolvency represents the creditors for the purpose of avoiding a chattel mortgage for non compliance with the Chattel Mortgage Act.

Bethune, Q. C., for the appellants.

J. J. Foy for the respondents.

Appeal dismissed.

From C. C. Waterloo.]

[March 27.]

MOORE V. KAY.

Landlord and Tenant—Action for refusal to admit—Statute of frauds.

The plaintiff brought an action against the defendant for damages for refusal to admit him into possession of land, which the plaintiff alleged the defendant had verbally agreed to give him a lease of the premises for sixteen months.

Held, affirming the judgment of the County Court, that the evidence failed to show an actual letting, but that even if such had been proved, the plaintiff must fail—under the fourth section of the Statute of Frauds, as like action was brought in respect of an agreement for interest in land.

Appeal dismissed.

From C. C. Grey.]

[March 27.]

AGAR V. STOKES.

Landlord and Tenant—Cesser of term.

The defendant leased to the plaintiff a mill and ten acres of adjoining land for five years, at the rent of \$500 for the first year, and \$550 for each of the four succeeding years, payable half yearly, in advance. The lease contained the usual clauses, and concluded with the following clause:—"And should the mill be rendered incapable by any fire or tempest, then the portion of the rent for the unexpired portion of the term paid for in advance, to be refunded by Stokes to Agar." To an action brought by the plaintiff to recover the portion of the term paid in advance, the mill having been destroyed by fire, the defendant pleaded by way of set off, money payable for rent due for the half year succeeding that in which the mill was destroyed.

Held, BURTON, J. A., dissenting, reversing the decision of the County Court, that the effect of the accident which rendered the mill incapable put an end to the term.

Appeal allowed.

From Blake, V. C.]

[March 29.]

SILVERTHORN V. HUNTER.

Liability of paid valuator for deficiency.

Held, dismissing the appeal, that no case was made to induce the Court to depart from its well understood rule, not to reverse the finding of the Judge of first instance.

Held, also, that a paid valuator is not liable for gross negligence in making a valuation unless it was false, to his knowledge, or fraudulently made.

Ferguson, Q. C., for the appellant.

Boyd, Q. C., for the respondent.

Appeal dismissed.

COMMON LAW CHAMBERS.

Armour, J.]

[March

ZARITZ V. MANN.

Division Court.—Service.—Prohibition.

In a Division Court suit, defendant was served one day too late for the ensuing sit-

tings, and did not attend. The Division Court Judge ruled that the defendant by entering a dispute note had shown that he knew when the trial would come on, and that he should therefore have attended. He accordingly gave judgment for the plaintiff with costs.

Held, that the defendant was entitled to full notice of the trial, and that a prohibition should issue.

J. F. Smith for plaintiff.

Ellis for defendant.

Osler, J.]

[March.

GOLDING V. MACKIE.

Ca. Sa.—*Render by bail—Supersedeas—Discharge—Reg. Gen. H. T., 26 Geo. III.*

The defendant was arrested under a *ca. sa.* and afterwards admitted to bail. Judgment was signed against him in the vacation between two terms, and he was surrendered by his bail in the vacation following.

Held, on an application for a *supersedeas* under *Reg. Gen. H. T. 26, Geo. III.*, that the render related back to the preceding term, and that the latter should count as one of the two terms within which the plaintiff should charge the defendant in execution.

J. B. Clarke for plaintiff.

G. D. Dickson for defendant.

Mr. Dalton, Q.C.]

[April 24.

SHELLY V. HUSSEY.

Examination—Trial—Verdict.

The plaintiff obtained an order to examine the defendant, and served the same upon him, with an appointment for the examination, on the commission day for the assizes at which the case was to be tried. The case was disposed of on the day on which the appointment was returnable, a formal verdict being entered for the plaintiff, subject to a reference.

Held, that the effect of the verdict was to render the order to examine, and the appointment nugatory, and that the defence could not be struck out on the ground that the defendant refused to attend.

Aylsworth for plaintiff.

Holman for defendant.

CHANCERY CHAMBERS.

The Referee.]

[Feb. 2.

Blake, V.C.]

[March 18.

CARMICHAEL V. FERRIS.

Land to be sold under decree—Tender for compensation.

Where land was advertised for sale under a decree and the purchaser, the owner of the adjoining lot, who had also been in possession by his son, of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was completed, and a subsequent encumbrancer offered to give the same price for them as the purchaser,

Held, by Mr. STEPHENS, Referee, that the petitioner should be put to his election either to take the land without abatement of the purchase money, or let it go to the subsequent encumbrancer.

Affirmed on appeal by BLAKE, V.C.

F. E. Hodgins for purchaser.

Armour for subsequent encumbrancer.

Plumb for infants.

Hoyle for plaintiff.

Spragge, C.]

[March 10.

RAMSAY V. McDONALD.

Conduct of Sale.

The plaintiff having the conduct of the sale of property under decree, applied for leave to bid at the sale.

The Referee refused the application, and on appeal, SPRAGGE, C., affirmed the Referee's judgment.

MASTER'S OFFICE.

The Master.]

[January.

BLOOMFIELD V. BROOKS.

Default of co-executor—Domicile.

J. B., Sr., and S. D., of Montreal had been executors of C. B., who died in Montreal about 1844; S. D. proved the will in Onta-

Master's Office.]

NOTES OF CASES.

[Master's Office.]

rio. The plaintiffs, two infants were solely entitled under this will. J. B., Sr., died in Montreal, in 1869, T. B. and J. B., Jr., were his executors, and both proved the will in Ontario; but T. B. alone acted as executor, J. B., Jr., having given him a power of attorney to act for him in all matters relating to the estate. The plaintiffs and T. and B. and J. B., Jr., were each entitled to one-third share under the will of J. B., Sr. Suit was brought for the administration of both estates and a receiver appointed.

In taking the accounts before the Master, S. D.'s attendance was dispensed with, as it appeared that none of the assets of C. B.'s estate in Ontario had come to his hands.

The Master found T. B. and J. B., Jr., who did not appear or file any accounts, indebted to the estates in about \$51,000. In default of evidence to show that any of the assets come to their hands formed part of C. B.'s estate, the Master further found that the whole formed part of J. B., Sr.'s estate. The decree on F. D. ordered the executors to distinguish the assets of each estate, and notified them that in default the whole would be taken to belong to the estate of J. B., Sr. T. B. having died, the suit was revived.

J. B., Jr., applied to the Court for leave to open and retake the accounts on the ground that he had been kept in ignorance of the proceedings by his executors. Leave was given him to surcharge and falsify.

J. B., Jr., now distinguished the assets of the estates and sought to be relieved from liability as to the estate of C. B. on the ground that he was not executor of that estate. As to the J. B., Sr., estate he also sought to be relieved in several respects. The Master's judgment is upon these points.

Held, that T. B., and J. B., Jr., did not by proving the will of J. B., Sr., become executors of C. B., as J. B. Sr. was not the sole or surviving executor of C. B.

Held, that J. B., Jr., is liable for the moneys of J. B., Sr.'s estate come to the hands of Thomas, whether before or after the proving of the will, or before or after the power of attorney. * * *

Held, that the writ of attachment or re-

gistration issued in Quebec did not affect the assets in Ontario.

Held, that as the Ontario Bank shares, though subscribed for at Montreal, and at one time registered there, were transferred to Bowmanville during the testator's life, and appeared on the stock register there only, they are Ontario assets.

Foster for John Brooke.

Langton for plaintiffs.

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH, AND APRIL, 1879.

(Continued from p 83.)

LIEN.

1. F., a ship-owner, employed S. & Co. to get insurance effected on his ship; and, to F.'s knowledge, S. & Co. employed B. for this purpose. This had been the usual course of business, and B. always retained the policies until the premiums and brokerage had been paid. A settlement was had between F. and S. & Co. monthly, and F.'s acceptances at one month taken for the balance. F. did not know the particulars of the arrangement between B. and S. & Co. On a loss occurring, F. demanded of S. & Co. a policy which had been retained by F. because the charges were not paid. S. & Co. not being able to produce the policy, F. brought detinue against B. for it. *Held*, that B. had a lien on it for his charges, as against F.—*Fisher v. Smith*, 4 App. Cas. 1.

2. E. mortgaged his property to his solicitors, who acted professionally for E., and prepared the mortgage to themselves, and they retained it. E. had previously given a first mortgage on the property, and he afterwards gave a third and fourth. The first mortgagee held the title-deeds. In an action against E., and the first, third, and fourth mortgagees, the solicitors claimed a lien on the mortgage-deeds and documents in their possession for the costs, charges and expenses incurred by them as the solicitors of E. *Held*, that there was no lien. "Reasonableness is the foundation of all the legal doctrine of lien." (per THESIGER, L. J.)—*Sheffield v. Eden*, 10 Ch. D. 291.

LIMITATIONS, STATUTE OF.

Defendant owed plaintiffs a large debt incurred in 1865, and in answer to a demand wrote them in May, 1874, as follows: "Believe me that I never lose out of my sight my obligations towards you, and that I shall be glad as soon as my position becomes somewhat better to begin again and continue my instalments." It appeared that, in 1874, defendant's position was bettered by £14, but was no better in any other year. In Septem-

DIGEST OF ENGLISH LAW REPORTS.

ber, 1876, he wrote again as follows: "Since the present year, I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living." It did not appear that the "general commercial crisis" had, in fact, "given way." *Held*, that the claim was not saved by these letters from being barred.—*Meyerhoff v. Froehlich*, 4 C. P. D. 63; s. c. 3 C. P. D. 333; 13 Am. Law Rev. 301.

See TRUST, 1.

MALICE.—See INJUNCTION.

MARINE INSURANCE.—See INSURANCE.

MARKET.—See SALE, 1.

MARRIAGE.—See JURISDICTION.

MARRIAGE SETTLEMENT.—See TRUST, 2.

MARRIED WOMEN.—See HUSBAND AND WIFE.

MISDESCRIPTION.

Joseph Wood, a farmer, lived on a farm called "Lache Hall Farm," near Chester, but within the County of the City of Chester. He was christened Joseph merely, but had assumed the name of Joseph Albert, and took the lease of his farm, and did his business in that name, and was known to his creditors by it. In 1876, he gave a mortgage or bill of sale to one H. as trustee for his wife for money advanced on his growing crops. He signed it "Joseph Wood," and was described in it as "Joseph Wood, of Lache Hall Farm, in the County of Chester, farmer," and the farm was described as in the occupation of "Joseph Wood," and situate in the "County of Chester." The affidavit of execution made by the witness repeated the same expressions. The document was duly registered under the Bills of Sale Act, 1854, exactly as it was written. That act requires a "description of the residence and occupation of the person making or giving the same." In 1878, wood was adjudged bankrupt, being described as "Joseph Wood, commonly called Joseph Albert Wood, Chester, farmer." There was no farmer of the same name in the County of Chester. *Held*, that the registration was not invalid for misdescription.—*Ex parte M'-Hattie*. In re Wood, 10 Ch. D. 398.

MORTGAGE.

1. A mortgagor who receives the rents and profits may maintain an injunction in his own own name to save the property from injury. It is not necessary to join in the mortgage. *Fairclough v. Marshall*, 4 Ex. D. 37.

2. In 1865, the S. company, limited, mortgaged its works to its bankers, to secure its current account for an amount not exceeding £50,000. There was a covenant to surrender the works, which were copyhold; but no surrender was ever made. There was an attornment clause, by which the company became tenants from year to year of the mortgagees, at a yearly rent of £5,000, which was a fair rent, with right in the mortgagees to enter and expel the mortgagors at will. July 17, 1870, two years' rent was due, and the bankers sent

an attorney to distrain, and he put two men, employed in the works, in charge as keepers. They remained in charge till October 6. July 18, the company asked the bankers to postpone the sale, and they did not proceed. July 19, a petition for winding up was made, and July 28, an order was granted, and a liquidator appointed. In November, the property was sold without prejudice, and realized less than the bankers' claim. *Held*, that the bankers were entitled to their sum as landlords under the distress, by virtue of the attornment clause. *Ex parte Williams* (7 Ch. D. 138) distinguished. —*In re Stockton Iron Furnace Company*, 10 Ch. D. 335.

3. F., by a writing, assigned his goods therein described, to a company "as their own proper chattels and effects," in consideration of a loan. If he paid the loan, the deed was to become void. If he became, *inter alia*, "embarrassed in his affairs," the company could at once take possession, and "until default be made in payment," he could "hold, make use of, and possess the said goods, chattels, and effects," without interference. The document was duly registered. The company heard subsequently that F. was embarrassed in his circumstances, as was the case, and put in a keeper without demanding payment, and before any payment was due. In subsequent bankruptcy proceedings against F., *held*, that company was entitled to the proceeds of the goods.—*Ex parte National Guardian Assurance Company*. In re Francis, 10 Ch. D. 408.

4. L., a merchant, was in the habit of strengthening his account at the bankers, by depositing securities from time to time. In 1876, his debit balance was £62,000, and on that day he deposited the title-deeds of his property at C., with a memorandum reciting that it was in consideration of £15,000, and that it was agreed that the security was "to cover any moneys due from time to time from" him to them with interest. He received the £15,000 at different times as he wanted it, and from time to time received back other securities previously deposited, as he partially paid off the previous advances. He also made further deposits of securities from time to time, including title-deeds of freehold and other real estate; but no other memorandum was given. On his death, *held* that the aggregate sum due the bank at his death was chargeable ratable on all the securities in the bank's hands at that time. *Lipscomb v. Lipscomb* (L. R. 7 Eq. 501) and *De Recherche v. Davies* (L. R. 12 Eq. 540) criticised.—*Leonino v. Leonino*, 10 Ch. D. 460.

5. W. had an execution in his house, and to discharge it, got £150 from C., with part of which he paid the execution. W. gave C. a receipt "for the absolute sale" of the furniture attached, and at the same time, a document was signed by W. and C., by which W. "hired" of C. the said furniture for two months for £170. If the £170 was not duly paid, or if during the time W. became bankrupt or the property became in any way liable to seizure, or W. should remove it from the house, C. was to have authority to take the goods at once. If C. took the goods and sold them, he

DIGEST OF ENGLISH LAW REPORTS.

should pay over to W. any balance received above the £170 and costs, and, if less than that sum was received, W. should be liable for the balance. When W. paid the £170 and costs, the property was to become his. *Held*, that the two writings constituted a mortgage, and were void against creditors as not being registered under the Bills of Sale Act (17 & 18 Vict. c. 36, §§ 1, 2, 7).—*Ex parte Odell. In re Walden*, 10 Ch. D. 76.

See LIEN, 2; SALE, 3, 4.

NAME.—See MISDESCRIPTION.

NEGLECT.—See PARTNERSHIP.

OBLITERATION.—See WILLS, 3.

PARTIES.—See MORTGAGE, 1.

PARTNERSHIP.

1. Two women, V. C. and M. W., became partners in business in London, in 1875, under the firm name of C. & W. In 1877, V. C. married one L. In 1878, the partnership was dissolved, and it was ordered by the court that "the said partnership business, and the leasehold premises, trade, fixtures, stock in trade, good-will, and business be forthwith sold as a going concern," to the partner who should bid the highest. M. W. was the purchaser, and she afterwards carried on the business under the old style. The deed of assignment contained the clause, "including the right to represent that the business as recently carried on by C. & W. is now being carried on by the said M. W." L. and his wife lived in Paris, and did business there under the firm name of C. & Co. *Held*, that M. W. could not be enjoined from using the old firm name; and per JAMES, L. J., that the assignment conveyed the right to its use.—*Levy v. Walker*, 10 Ch. D. 436.

PATENT.—See JUDGMENT.

PAYMENT.—See SURETY.

PLEADING AND PRACTICE.—See ACTION; JUDGMENT; MORTGAGE, 1; TRUST, 1.

POLICY.—See LIEN, 1.

PRINCIPLE AND SURETY.—See SURETY.

PROMISE.—See LIMITATIONS, STATUTE OF.

PROVISO.—See MORTGAGE, 3.

REALTY AND PERSONALITY.—See CONVERSION; WILL, 6.

RECEIPT.—See SALE, 4.

RESIGNATION.—See MISDESCRIPTION; MORTGAGE, 5; SALE, 3.

RELIGIOUS EDUCATION.—See HUSBAND AND WIFE.

REMOTENESS.—See WILL, 2.

RES ADJUDICATA.—See JUDGMENT.

RESIDENCE, RIGHT TO NAME.—See INJUNCTION.

RESIDUARY LEGATEE.—See LEGACY.

RECOVATION.—See WILL.

RIGHT OF WAY.

By a public Act, a corporation was empowered to build a pier according to plans. It was alleged that, if the pier was built in the manner provided by the act, a certain public right of way would be thereby rendered unavailable for use. *Held*, that, if that were the case, the Act must be held to have extinguished the right of way by implication, though no reference was made to the matter in the Act.—*Corporation of Yarmouth v. Simmons*, 10 Ch. D. 518.

RIPARIAN RIGHTS.—See WATERCOURSE.

SALE.

1. A man brought pigs into market, and sold them with all faults and expressly without warranty. They turned out to have typhoid fever, and died on the purchaser's hands, and infected his other pigs. The acts of the seller amounted to a breach of the statute prohibiting such sale in market of infected animals, and inflicting a penalty. *Held*, that the existence of the statute did not raise an implied representation that the pigs were sound, and the purchaser had no remedy.—*Ward v. Hobbs*, 4 App. Cas. 13; a. c. 2 Q. B. D. 331; 3 Q. B. D. 150; 12 Am. Law Rev. 104, 738.

2. One W. obtained some sheep of the defendant, under colour of a purchase, but in fact by false pretences. The plaintiff bought them of W. *bona fide*, and in regular course, but not in market overt. October 25, W. was arrested on a warrant procured by the defendant, for obtaining goods under false pretences, and November 7 following, he was convicted under 24 & 25 Vict. c. 96. That Act provides that, in case of obtaining goods by false pretences, where a person is "indicted on behalf of the owner of the property, and convicted, . . . the property shall be restored to the owner." Meanwhile, on November 7, the defendant found the sheep, and went and took them into possession. *Held*, that the statutes did not affect the question between these parties, and the defendant was liable for conversion. The reason of the rule giving preference to the innocent purchaser, as laid down in *Root v. French* (13 Wend. 570), preferred by Cockburn, C. J., to the English reason as given in "Benjamin on Sales."—*Moyce v. Newington*, 4 Q. B. D. 32.

3. Where household goods are sold, and a receipt given for the purchase-money, and a detailed inventory of the goods is attached and made part of the receipt, and the seller remains in possession, the sale is void as against creditors, unless the document is registered under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). *Allopp v. Day* (7 H. & N. 457), and *Byerley v. Perrot* (L. R. 6 C. P. 144), discussed. See *Woodgate v. Godfrey* (4 Ex. D. 59).—*Ex parte Cooper. In re Baum*, 10 Ch. D. 313.

4. The household goods of W., a judgment debtor, were seized under a *f. fa.*, and sold by the sheriff to the father-in-law of W., who took a receipt therefor containing an inventory of the goods. The same day the purchaser let

DIGEST OF ENGLISH LAW REPORTS.

the house where the goods were, together with the goods, to W. at a yearly rent, and W. remained in possession. *Held*, that the receipt did not require registration under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36, §§ 1, 7). The receipt was only evidence of payment, and not in the nature of a bill of sale.—*Woodgate v. Godfrey*, 4 Ex. D. 59.

See MORTGAGE, 5.

SETTLEMENT.—See TRUST, 2.

SLANDER.—See LIBEL.

SOLICITOR.—See LIEN, 2.

STATUTE.—See CORPORATION; RIGHT OF WAY; SALE, 1.

STATUTE OF LIMITATIONS.—See LIMITATIONS, STATUTE OF.

SURETY.

Action by a bank on the following guaranty, signed by the defendant: "You having this day, at my request, placed the sum of £2,000 to the credit of C.'s account with you, in the event of his promissory notes and interest, or any of them representing that amount, not being paid at the due dates, I hereby undertake, upon demand, to secure payment of the same upon the Adelphi Theatre," &c. Ten notes of £200 each were given, payable at intervals of a week. C. had a general account and also a special account at the bank. The £2,000 was credited to the general account. Two sums of £200 each were expressly debited to the general account. Subsequently, enough deposits were made to cover the whole loan; but the bank did not enter them to the general account, but honoured C.'s checks against them. When the notes became due, the bank claimed the mortgage, on the ground that the notes were all unpaid. *Held*, that the bank was bound to have applied the deposits to payment of the guaranteed notes, and the surety was not bound.—*Kinnaird v. Webster*, 10 Ch. D. 139.

TORT.—See ACTION.

TRADE NAME.—See PARTNERSHIP, 1.

TRUST.

1. P., by will, in 1779, gave his estate to his son R. and the heirs of his body in tail male, "upon special trust and confidence" in his said son, that, in case of failure of issue, he "would not do nor suffer any act in law or otherwise to obstruct or prevent" the limitations and provisions of the will. R. suffered a recovery of the estates as soon as he came into possession. R. died in 1808, without issue. *Held*, that the will did not create a trust, and that R. had power to bar the entail. The defence of the Statutes of Limitations may be raised on a demurrer which states a different specific objection to the statement, and adds the words "and on other grounds sufficient in law to sustain the demurrer." But the Statute of Frauds must be specifically pleaded.—*Dawkins v. Penrhyn*, 4 App. Cas. 31.

2. A marriage settlement empowered the

trustees to use the income for the husband, wife and children, as they in their "uncontrolled and irresponsible discretion" should think proper. The husband was a drunkard and lived apart from the wife, and the trustees paid all the income to him, except the board of the only child at school. The income was £300 a year above the child's board, and the wife was destitute. *Held*, that although the court did not approve of the course of the trustees, it could not interfere.—*Tobor v. Brooks*, 10 Ch. D. 278.

VENDOR AND PURCHASER.—See SALE, 1, 2.

WARRANT.—See EXTRADITION.

WATERCOURSE.

"The right to the water flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbour's land, do not rest on the same principle. In the former case, each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some legal origin."—*Rameshwar Pershal Narain Singh v. Koonj Behari Pattuk*, 4 App. Cas. 121.

WILL.

1. Testatrix gave a sum in trust for her brother C. for life, remainder to C.'s wife E. for life, remainder to "all and every the children of the said" C. "living at the death of the survivor of them, the said" C., and E. his wife, and the issue of such of them as shall be dead. C. had three children by a first wife, she had also two by E. before he married her, and one afterwards. Evidence was offered that testatrix had promised C. to make the bequest to all the children, if he would marry E.; that she had always treated the children alike as her nephews and nieces; and that, in preparing her will, she gave directions that they should be treated alike, and she supposed the will to be to that effect. One legitimate daughter was married to B., a brother of a member of the firm of solicitors who drew the will. *Held*, that extrinsic evidence could not be admitted, and the legitimate children only could take. *Dorin v. Dorin*, (L. R. 7 H. L. 568), and *Laker v. Hordern* (1 Ch. D. 644), discussed.—*Ellis v. Houstoun*, 10 Ch. D. 236.

2. F., by will, gave all his property to those children of his two daughters who should attain twenty-five. At F.'s death, one daughter had two infant children; the other, three children, one of whom had attained twenty-five. *Held*, a gift to such of the children as a class, living at the death of F. as should attain twenty-five. If there had been no children of the two daughters living at the death, the gift would have been void for remoteness.—*Picken v. Matthews*, 10 Ch. D. 264.

DIGEST OF ENGLISH LAW REPORTS—CORRESPONDENCE.

3. E., by will made in 1826, gave certain freehold lands to his mother, "to hold unto her, . . . her heirs and assigns for ever." The will was properly attested, the interlineation of two words being mentioned. When the will was produced, the words "her heirs and assigns for ever" were found erased by a line struck through them in ink. *Held*, a valid obliteration under the Statute of Frauds (29 Car. II. c. 3, § 6), and the mother took a life-estate only.—*Swinton v. Bailey*, 4 App. Cas. 70; s. c. 1 Ex. D. 110; 10 Am. Law Rev. 713.

4. "Executorship expenses" means the same as "testamentary expenses" in a will.—*Sharp v. Lush*, 10 Ch. D. 468.

5. H., by will dated in 1820, gave, in one clause, a leasehold and three freehold houses to his daughter S. for life, without impeachment of waste; remainder to the first and other sons of S. successively in tail male, and, in default of such issue, to the daughters of S. successively in tail, and, "in case of default of issue" of S., "to the right heirs of the said S. for ever." S. married, became a widow, and died without having had any children. *Held*, that she took an absolute title in the leaseholds.—*Herrick v. Franklin*, (L. R. 6 Eq. 593) considered.—*Comfort v. Brown*, 10 Ch. D. 146.

6. B., by will dated 1818 and not attested so as to carry real estate, gave the "rest of my property" in trust to his brother's children for life, "and on the decease of either of them, his or her share of the principal to go to his or her lawful heir or heirs." *Held*, that "heirs" must be taken literally. *Mounsey v. Blamire* (4 Russ. 384), disallowed.—*Smith v. Butcher*, 10 Ch. D. 113.

7. C., by will, gave one-fourth of her residue in trust for each of her three sons, and the remaining one-fourth to her grand-daughters, with a declaration of forfeiture in case of bankruptcy or insolvency of a beneficiary, and a disposition over. C. died in 1875, and the will was dated in 1874. W., a son, was adjudged a bankrupt in 1873. C. was a creditor, and proved. In 1875, after C.'s death, W.'s creditors accepted a proposal for composition, but it was not carried out. In 1876, a decree for the administration of the trusts under C.'s will was made. In 1878, a composition between W. and his creditors was made, and the bankruptcy was ordered to be annulled, *Held*, that there was no forfeiture.—*Ancona v. Waddell*, 10 Ch. D. 157.

See CONVERSION; LEGACY.

WORDS.

"Children."—See WILL, 1.

"Clause."—See WILL, 3.

"Default of Issue."—See WILL, 3.

"Lawful Heirs."—See WILL, 6.

"Right Heirs."—See WILL, 5.

"Uncontrolled and Irresponsible Discretion,"—See TRUST, 2.

CORRESPONDENCE.

Unlicensed Conveyancers.

To the Editor of the LAW JOURNAL.

SIR,—Your warm advocacy of the rights of the County practitioners deserves and no doubt receives their warmest gratitude. It is to be hoped that next session a Bill will be passed to prevent the unseemly contest between licensed and unlicensed conveyancers.

The proportion the latter bear to the former in the country districts is as five to one—in other words in every village where you find a professional man, you will on the average find five "jackals" to rob him of his practice, a practice to which he is entitled by the certificates which he has obtained and by the responsibility he incurs.

In the country more than one half of the legal business is necessarily conveyancing, and the only answer so far to the cry of poor professional men for protection is something like this, "You are undoubtedly entitled to protection, but the profession is so unpopular now;" or, it is right but "inexpedient." We are in a bad way in this country if *Right* and *Justice* have to give way to expediency and to the cry of ignorance. I cannot help thinking that if the matter were properly laid before Mr. Mowat by the Benchers, that he would remedy this great and growing evil.

Yours &c.,

A SUFFERER.

[It is hard to say what the result would be of an appeal to Mr. Mowat on this subject. It is not perhaps worth discussing as it is not likely to be made. We had hoped that an Attorney-General having so large a majority might have thought proper to have brought in some equitable measure of relief, especially as he has personally, we believe, an earnest desire to advance the interests of his profession. We despair of the Benchers taking the initiative, as they ought to. Country practitioners will have to combine and agree on some concerted plan of action, before they die of inanition. The difficulty is that the Benchers are not

CORRESPONDENCE—FLOTSAM AND JETSAM.

in truth a *representative* body, although elected by the very men who now, with great reason, complain of the evil alluded to. They are composed mainly of eminent counsel or practitioners with large business in the principal cities, who do not feel, and seem unable to comprehend, or are too busy to think about the difficulties of their brethren who are struggling for existence against overwhelming odds in the numerous small towns and villages in the Province. There should be a representation in Convocation of men who are conversant with the practical crying wants of the great mass of the profession, and have sufficient fellow-feeling to do something to remedy the gross injustice to which so many country practitioners are now subjected.—Eds. L. J.

Unlicensed Conveyancers—Deputy Clerk of Crown at Barrie.

To the Editor of the LAW JOURNAL.

SIR,—In several of the later numbers of your excellent journal, I have been pleased to notice parties laying before you and the public generally complaints with reference to *soi-disant* "conveyancers." They show that the places from which they come have not half the grievances to complain of that we professional men in this Town of Barrie have. There are not only five or six of these pettifoggers here, but there are as a matter of fact nearly as many as twenty, and one of these, our wealthy postmaster, does so much business of that description that he has to employ a staff of clerks, and I am told that he does as much conveyancing as any five firms in the County. His success in this line induces him to come forth even more boldly, and now he appears as mortgagee's agent in proceeding under power of sale. But, sir, this is not all. Even our Deputy Clerk of the Crown draws deeds, mortgages, *wills* and *chattel mortgages*, and searches appearances, signs judgments, enters records, &c., &c., for outside offices, and thus destroys our agency business. The fact of the matter is this state of things should be prohibited by legislative enactment. The Registrars are not allowed to

draw deeds or mortgages. Then why should Deputy Clerks, who have the custody of wills, chattel mortgages, and other records, be permitted to do business with reference to them outside of their legitimate sphere? Mr. Mowat, with all his reform cannot do better than look to these matters before bothering his head with that immense overhauling called "The Judicature Act of 1880."

Yours obediently,

Barrie, April 15, 1880.

S. H.

[We have already called the attention of the Attorney-General to this matter. We trust he will take some action. The present state of things is most objectionable.—Eds. L. J.]

FLOTSAM AND JETSAM.

THE TICHEBORNE CLAIMANT.—On the application of Mr. E. Kimber, solicitor for the "Claimant," the Attorney-General has granted his fiat for a writ of error in the matter of the late trial of Arthur Orton for perjury. The grounds of error alleged are that the two separate sentences of seven years' penal servitude passed upon the claimant were substantially for one and the same offence. On the argument of the case, should the appeal be successful, the Claimant would be entitled to his liberty at the expiration of the first term of seven years.

TIT FOR TAT.—A medical practitioner, urgently wanted patients, and not understanding the difference between attracting and disgusting, circulates through the city postal cards addressed to any gentleman of sufficient eminence to draw his attention, on which he offers his services to cure them of fits, falling sickness, epilepsy, and all the ills, too disagreeable to mention, that flesh is heir to; closing with the agreeable assurance that he will treat them in perfect confidence. Imagine his disgust on receiving from a witty lawyer this response, also spread on a post card: "Dear Sir,—I offer you my services to defend you on your trial for murder, arson, robbery, larceny, malpractice, criminal abortion, indecent assault, body-snatching, and obscene communications. I can secure, if not your acquittal, at least the mitigation of punishment, every time. N. B.—This postal card is strictly confidential."—*Albany Law Journal*.

LAW SOCIETY, HILARY TERM.



Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 43RD VICTORIÆ.

During this Term, the following gentlemen were called to the Bar, (the names are not in the order of merit, but in the order in which they stand on the Roll of the Society):—

GEORGE WHITFIELD GROTE.
 WILLIAM COSBY MAHAFFY.
 P. A. MACDONALD.
 WILLIAM LAWRENCE.
 WILLIAM LEIGH WALSH.
 JOHN J. W. STONE.
 COLIN SCOTT RANKIN.
 HORACE COMFORT.
 ALEXANDER V. MCLENEGHAN.
 MARTIN SCOTT FRASER.
 WILLIAM PATTISON.
 WM. REUBEN HICKEY.
 GEORGE MONK GREEN.
 JAMES THOMAS PARKES.
 MICHAEL J. GORMAN.
 HARRY EDMUND MORPHY.
 CHARLES AUGUSTUS KINGSTON.
 JOHN HY. LONG.

Special Cases.

JAMES C. DALRYMPLE.
 JOHN JACOBS.

The following gentlemen have been entered on the books of the Society as Students-at-Law and Articled Clerks:—

Graduates.

PETER L. DORLAND.
 LEWIS CHARLES SMITH.
 MATTHEW M. BROWN.
 PETER D. CRERAR.
 RUFUS ADAM COLEMAN.

Matriculants.

ANDREW GRANT.
 JAMES MACCOUN.
 FRANCIS R. POWELL.
 JOHN TYTLER.
 THOMAS JOHNSTON.

Primary Class.

ROBERT VICTOR SINCLAIR.

HECTOR COWAN.
 WILLIAM BEARDSLEY RAYMOND.
 WILLIAM ALBERT MATHESON.
 ARTHUR B. MCBRIDE.
 FRANK HORNSBY.
 WILLIAM AUSTIN PERRY.
 JOSHUA DENOVAN.
 M. J. J. PHELAN.
 ARTHUR EDWARD OVERELL.
 ROBERT SMITH.
 HUGH MORRISON.
 JOHN MCPHERSON.
 AMBROSE KENNETH GOODMAN.
 J. A. MCLEAN.
 THOMAS IRWIN FOSTER HILLIARD.
 RANALD GUNN.
 PHILIP HENRY SIMPSON.
 JOHN GEAE.
 EDWARD A. MILLER.
 JOHN GREER.
 DANIEL FISKE MCMILLAN.
 CHARLES ADELBERT CRAWFORD.
 FREDERICK ERNEST COCHRANE.
 WILLIAM PEARCE.
 ANDREW GILLESPIE.
 G. A. KIDD.

Articled Clerks.

G. R. VANNORMAN.
 E. M. YARWOOD.
 J. HEIGHINGTON.

RULES AS TO BOOKS AND SUBJECTS
FOR EXAMINATIONS, AS VARIED
IN HILARY TERM, 1890.*Primary Examinations for Students and Articled Clerks.*

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

Ovid, *Fasti*, B. I., vv. 1-300; or,
 Virgil, *Æneid*, B. II., vv. 1-317.
 Arithmetic.
 Euclid, B. I., II., and III.
 English Grammar and Composition.
 English History—Queen Anne to George III.
 Modern Geography—North America and Europe.
 Elements of Book-keeping.

Students-at-Law.

CLASSICS.

1890 { Xenophon, *Anabasis*, B. II.
 { Homer, *Iliad*, B. IV.
 1880 { Cicero, in *Catilinam*, II., III., and IV.
 { Virgil, *Eclog.*, I., IV., VI., VII., IX.
 { Ovid, *Fasti*, B. I., vv. 1-300.

DIARY—CONTENTS—EDITORIAL NOTES.

DIARY FOR JUNE.

- 5. Sat. ..Easter Term ends.
- 6. Sun. ..Second Sunday after Trinity.
- 8. Tues...County Court sittings(except York) begin.
- 13. Sun. ..Third Sunday after Trinity.
- 14. Mon...County Court Term for York begins.
- 15. Tues...Magna Charta signed, 1215.
- 17. Thur...Burton and Patterson, J. J. Ct. of Appeal,
sworn in, 1874.
- 18. Fri....Earl Dalhousie, Governor-General, 1820.
Battle of Waterloo, 1815.
- 19. Sat. ..County Court Term ends.
- 20. Sun. ..Fourth Sunday after Trinity. Accession of
Queen Victoria, 1837.
- 21. Mon. ..Galt, J., sworn in C. P., 1869.
- 23. Wed. ..Hudson's Bay Company Territory transferred
to Dominion, 1870.
- 27. Sun.Fifth Sunday after Trinity.
- 28. Mon. ..Queen Victoria crowned, 1837.

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Canada Law Journal.

Toronto, June, 1880.

A recent return to Parliament gives a number of figures as to the insolvencies in the various Provinces, in the years 1878 and 1879. In Ontario the number in 1878 was 752, with liabilities to the amount of \$10,929,622, whilst in 1879 the number increased to 788, but with liabilities reduced to \$8,612,907. The corresponding figures, as to Quebec, are 518, and \$11,081,035, for 1878, and 638 and \$13,650,914, for 1879. The average dividend per cent. was, for Ontario 38·3 in 1878, and 33·4 in 1879; and for Quebec, 21·9 in 1878, and 34·8 in 1879.

Is there any diversity of opinion regarding the following deliverance of the *Solicitor's Journal*? "The tendency of the day in all matters—and legal matters form no exception—seems to us to be towards over-elaboration. Essays such as Lord Bacon's could never be produced at the present day; where he would write an essay on a topic in a couple of pages, a thinker of the present day would occupy forty. The same kind of observation applies to many judgments of the present day." In this connection we would commend the singular succinctness—the comprehensive brevity of the opinions—of Chief Justice Waite of the Supreme Court of the United States. They are models of judicial directness for which the over-worked advocate is thankful in this age of voluminous judgments.

We had hoped before this to have furnished our readers with a review of Mr. Alpheus Todd's recent able work upon "Parliamentary Government in the Brit-

EDITORIAL NOTES.

ish Colonies." It has, however, taken longer in preparation than we had anticipated, and it would be scarcely worth while to refer to such an important subject during the "dog days;" but when our friends return refreshed from their holidays, we hope to treat it in a manner worthy of its importance. We shall, at the same time draw the attention of those of our readers who have not already perused them to two minor works upon kindred subjects, which have recently appeared, viz: "The Powers of Canadian Parliaments," by Mr. S. J. Watson; and "A Manual of Government in Canada," by D. A. O'Sullivan. The obvious bearing, which the subjects of which they treat have upon the still imperfectly developed constitutional law of the Dominion is quite sufficient reason for a somewhat lengthy notice of their contents in these pages.

The views which we have from time to time advocated in these columns, with reference to the advantages of there being but one judgment embodying the reasons of the Judges sitting in Appeal, have received weighty confirmation on the floor of the Dominion House, as will appear from the following extracts from the speech of the Honourable Edward Blake, delivered on the occasion of the Bill to repeal the Supreme Court:—

"I believe it would be a very great advantage to adopt, to a large extent, the rule of the Privy Council, as the mode of delivering judgment. The opinion of the Appellate Court, which is practically a Court of Final Appeal, should be confined to the precise matter in hand, and any judicial divergence of opinion, or subject not necessary to be decided, should be absolutely eliminated. The course pursued in the Privy Council is well known, I presume, to all lawyers. The Judges, after hearing argument, deliberate at the earliest moment, and, having come to general conclusions, it is ar-

ranged that some one of them shall prepare and deliver the judgment in the particular case. This Judge prepares a draft, conveying, as well as he can, the arguments which have led to the agreed conclusion. The draft is printed and laid before each of the other Judges, who note on it any remarks which may occur to them. If necessary, there is another meeting for deliberation, and the judgment in the end is the general finding of all delivered by one. Thus, instead of uncertainty and confusion in matters which are not necessary for decision being raised by *obiter dicta*, the judgment is confined to the real question in issue; and upon that question it presents the views which are common to the event. I believe such a mode of delivering judgments would have conduced largely to the confidence which should be reposed in the Supreme Court."

Up to this time we do not remember ever having had occasion to object to anything in our valued contemporary the *Albany Law Journal*, which is undoubtedly one of the best conducted legal journals in the United States, as being in bad taste; but we think the reference to the fiasco of the, then, impending prize fight in their issue of the 22nd May is hardly fair. After referring to "dead letter laws" the writer says: "So in regard to the prize fight; it was notorious for some weeks that the principals were in training, and they might have been arrested while on their way to Canada. But nothing of the sort was done, and the ruffians might have pounded themselves to their hearts' contents but for the vigilance of the Canadian authorities." Now, so far, this is all true. The writer might also have referred in this connection to the time when it was notorious for some months that the Fenian ruffians were preparing for a raid on Canada, and actually marched through Buffalo with arms in their hands and flags flying, and they might have been arrested while on their way to

EDITORIAL NOTES—LEGAL METAPHORS.

Canada. But nothing of the sort was done and the ruffians might have ravaged our country to their hearts' content (and apparently without any regret on the part of the people of the United States) but for the vigilance of the Canadian authorities. This unneighbourly conduct, however, is as much forgotten and forgiven as is the way in which our claims for injuries were ignored in connection with that same raid; and this at a time when the world saw the spectacle of a great nation fighting over money obtained from England to pay for bogus claims and claims for injuries which never took place, and which money should in common honesty have been returned. But what we do object to is this further remark of the writer:—"It is even intimated that these authorities would not have interfered but for the importunate intelligence conveyed by the backer of one of the principals who desired a postponement." This may be the reason for the authorities acting in like cases in the United States, and the above sentence would seem to indicate that such a thing would not in that country excite much surprise. But the writer is mistaken if he thinks that part of the Anglo Saxon race to the north of the lakes are as "advanced" in this respect as that to the south of them.

LEGAL METAPHORS.

There can be little question that an amusing and even a beautiful and instructive article might be written upon the use of metaphors by judges and legal writers. Few can have failed to have been struck from time to time by the recurrence of such breaks in the tedium of the Reports or the Text books. Few, again, could deny that many of them are as beautiful as they are to the point. One such, for example, occurs in *Bright v.*

Legerton, 2 D. F. & J. 607, where it is remarked with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass, that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed. Nor can a certain beauty be denied to the method by which, in the old Year Book, 9 Hen. VI. 24 b, the sale by executors under power in a will is illustrated: *et issint* (thus) on *aura loyalment franktenement de cestuy qui n'avoit rien, et en meme le maniere come on aura fire from flint, et uncore nul fire est deins le flint, et ceo est pour performer le darrein volonte de le devisor.*

And, perhaps, the observation of the American judge in *Farmers and Mechanics' Bank v. Kingley*, 2 Doug. (Mich.) 379, is worthy to rank with these, where he says, "It would be as difficult for me to conceive of a surety's liability continuing after the principal's obligation was discharged, as of a shadow remaining after the substance was removed."

Of all text writers, Mr. Joshua Williams is, perhaps, pre-eminent in his liking for the use of metaphors. There is one, which is especially amusing, and which, as perhaps a little too pointed, he omits altogether in subsequent editions of the work in which it occurs. In a former edition of his work on Real Property he remarked, with reference to the Act to render the assignment of satisfied terms unnecessary (Imp. 8 & 9 Vict. c. 112, sec. 1), an enactment which, by the way, does not appear to have been adopted in Ontario—that it was like saying that everyone should leave his umbrella at home, except that such umbrella, which shall be so left at home as aforesaid, shall afford to every person, if it should come on to rain, the same protection, as it would have afforded to him if he had it with him. And, again (Real Prop. Ed.

LEGAL METAPHORS—WITNESSES AND WITNESSES.

11, p. 460), he speaks of the present fashion of tinkering the laws of real property, preserving untouched the ancient rules, but "annually plucking off, by parliamentary enactments, the fruits which such rules must, until eradicated, necessarily produce."

Even the Judicature Act has received its metaphorical adornments. Thus last year, in the Court of Appeal, at Lincoln's Inn, in the course of a case involving the doctrine of a wife's equity to a settlement, Lord Justice Bramwell said: "There's no such thing as an equity since the Judicature Acts came into operation—is there?" Counsel ventured to suggest that it was rather law than equity which had been abolished. "It's like shot silk," observed Lord Justice James, "both colours are there, and it depends upon the light in which you look at it which colour you see."

As an illustration of the reverse process, that is, of illustrating general subjects, by metaphors borrowed from the law, may be mentioned Sir Fitzjames Stephen's remark in his note on Utilitarianism in his "Liberty, Equality and Fraternity," where he says that "to suppose that Christian morals can ever survive the downfall of the great Christian doctrine of a future state of rewards and punishments, is as absurd as to suppose that a yearly tenant will feel towards his property like a tenant in fee simple. To say that, apart from the question whether there is or is not a future state of rewards and punishments, it is possible to compare the merits of Christian and heathen morality, is as absurd as to maintain that it is possible to say how the occupier of land ought to treat it without reference to the nature and extent of his interest in the land."

F. L.

WITNESSES AND WITNESSES.

It is said that Dugald Stewart had strong Scottish prejudices against trial by jury in civil cases which were converted into admiration by the accident of his hearing an able cross-examination in an English Court on a case of trespass to real property. But his admiration was not so much of the jury system as of the mode in which the truth was elicited for adjudication. Long experience has demonstrated that no means for obtaining truth was comparable to those whereby the parties can be fully examined both on their own behalf and by the adversary, and when the testimony is elicited *viva voce* in open court. These two, *viva voce* evidence and the examination of parties, have been well likened to a pair of powerful implements sharp as two edged swords for the dividing asunder of truth from falsehood.

It is a favourite topic with the lay-press and the lay-public to insist upon the brow-beating of counsel and the badgering of witnesses, but experience demonstrates that witnesses are seldom treated worse than they deserve, and have in most cases to thank themselves for any want of consideration shown to them. Any frequenter of the courts must have observed how unsatisfactory witnesses are in general; how some are utterly unable to answer the simplest question straightforwardly; how others answer one question by asking another; how others ramble from one topic to another and fail to appreciate the particular thing as to which information is sought. All this arises no doubt, in the upright witness, from habits of loose, indefinite thinking, and from the confusion and embarrassment arising from the novelty of his position. But how seldom does one meet with the perfectly upright witness! From the experts of whom Lord

WITNESSES AND WITNESSES.

Campbell once said "they come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence" (10 Cl. & Fin. 191), down to the humble friend and neighbour—they all endeavour instead of answering the questions fairly and directly to state something which would qualify the effect of an answer favourable to the questions if opposed to their own side. It is not the business or duty of the witness to trouble himself with explanations; these will be attended to by the opposite counsel who will adjust the latter if the facts have been distorted or insufficiently brought out.

Every counsel will have made mental notes for himself of the different classes of witnesses and their peculiarities, and of the various indications of their insincerity or credulity. Thus, for example, the late David Paul Brown, of Philadelphia, after much experience and observation at the bar, said that one most certain rule to determine that a witness was giving false testimony was when he uniformly repeated the questions put to him on cross-examination—the object being to gain time for making his answer, and to concentrate his mind upon the nature of the answer to be made. So the witness who proclaims his indifference and protests his honesty, and the witness who has no memory of facts when he can be contradicted by others, but has all the minutiae of transactions at his finger's ends where he is the sole witness, and the witness who flippantly answers before he has heard the question—all these declare their own condemnation.

So too we have all come across the timid witness who cannot be got to speak above a whisper, the stupid witness whose testimony is so contradictory or imperfect that he had better have left your questions unanswered, the eager

witness whose testimony is so exaggerated or effusive that you wish he had said more or said less, the pompous witness who generally leaves the box feeling that he is a very much aggrieved man.

With regard to the evidence of *servants* and *children*, and their tendency to colour or exaggerate, some acute observations are found in Macaulay's "Essay on History": "Children and servants are remarkably Herodotean in their style of narrative. They tell everything dramatically. Their *says he's* and *says she's* are proverbial. Every person who has had to settle their disputes knows that even when they have no intention to deceive, their reports of conversations always require to be carefully sifted. If an educated man were giving an account of the late change of administration he would say, 'Lord Goderich resigned, and the King, in consequence, sent for the Duke of Wellington.' A porter tells the story as if he had been hid behind the curtains of the royal bed at Windsor. 'So Lord Goderich says, I cannot manage this business, I must go out. So the King says, says he, well, then, I must send for the Duke of Wellington, that's all.'"

The weight of judicial opinion appears to be in favour of the grim proposition that a woman can tell a lie better than a man. Baron Huddleston in a recent trial for perjury discussed this matter before a jury. He said it was a remarkable circumstance that when a woman was determined to say that which was untrue, she did it a great deal better than a man. Whether it was that a man was more conscious of his dignity (?), was a metaphysical question he could not answer; but it was certain that a woman did tell a story much more logically and perseveringly than a man could. He was glad that it was a question for the jury to say whether the girl should be believed, for he himself admitted his in-

WITNESSES AND WITNESSES—PRACTICAL JOTTINGS.

capacity to gauge the veracity of a woman when she appeared in the box. In accord with this view the observations the other day at Owen Sound by a learned judge, when he said it was an established fact, recognised by the legal profession in general, that it was much more difficult to break down, in cross-examination, a false statement when made by a woman than when made by a man, the reason being that women have greater self-possession under such circumstances than men. It would seem as if the Common Law bench had never forgiven frail women for what Douglas Jerrold calls that matter of the apple. Somewhat more generous views have been expressed by some equity judges as for instance by the then Master of the Rolls, Lord Romilly, in *Thomas v. Finlayson*, 19 W.R. 255, where he said that the court had never made a man pay costs for believing the word of a woman, and he would not be the first judge to do so. But we fear that even equity judges have not recognised or adopted this line of decision to any great extent.

PRACTICAL JOTTINGS.

SIMILITERS.

Similiters are not abolished by the Common Law Procedure Act (Harr. 2nd ed. p. 132). Indeed, if the plaintiff *takes issue* on affirmative pleas of the defendant, it appears that he should add a similiter for the defendant (Paterson's Com. Law, vol. 1, p. 203). But if the plaintiff has served notice of trial, he is estopped from denying that the cause is at issue (*Wilkes v. Wilkins*, 1 P. R. 90; *Archibald v. Cameron*, 1 P. R. 138); and, although, if plaintiff *joins issue* on negative pleas of the defendant, it is not necessary to add a further pleading for the defendant, the cause being then at issue (Paterson, *ubi*

sup.), yet, in such case, if defendant wants a jury, and plaintiff has filed no jury notice, he may file and serve a similiter with a jury notice annexed, it being legitimate to use a similiter as a last pleading in this way (*Quebec Bank v. Gray*, 5 P. R. 31); and even if plaintiff has served a notice of trial with his joinder, yet defendant may do this (*McLaren v. McCuaig*, 8 P. R. 54). But plaintiff can forestall a defendant in respect of this, unless a defendant, who wishes for a jury, serves his jury notice with his pleas. For where the plaintiff's pleading is a mere negative to the defendant's, the plaintiff can, by the practice of the Courts, add a joinder for the defendant (R. S. O. c. 50, s. 117). If, then, the plaintiff joins issue, and files a similiter for the defendant, there now remains nothing to which the defendant can annex a jury notice, as there can only be one similiter (*Hyde v. Casmea*, 8 P. R. 137).

DISCOVERY OF DOCUMENTS.

R. S. O. c. 50, sec. 169, enacts that discovery may be ordered, "upon the application of any party to a cause or civil proceeding stating his belief upon affidavit, etc." This corresponds to sec. 50 of the Imp. C. L. P. Act, 1854 (17 & 18 Vict. c. 125), which enacts that discovery may be ordered, "upon the application of either party to any cause, etc., upon an affidavit by such party of his belief, etc." In *Hirschfield v. Clark*, 25 L. J. N. S. 113 (1856), and in *Christopherson v. Lotinga*, 33 L. J. N. S. 121 (1864), followed in our own Courts, in *Earwick v. De Blaquiére*, 4 P. R. 267, it was held that, under the above enactments, a discovery cannot be ordered except upon an affidavit by the party himself, that a judge of the Court has no power to dispense with such affidavit, and that an affidavit by the attorney of the party is not sufficient. In

PRACTICAL JOTTINGS.

Christopherson v. Lotinga, the whole question was argued as to whether the words of the statute were directory, or imperative, and all four judges held, reluctantly, that they were imperative. But in the case of a corporation, though no provision to that effect is contained in the statute, since a corporation is incapable of making an affidavit, and perhaps of forming a belief, the affidavit of the attorney is admitted, on the principle of the beneficial construction of remedial statutes. (Maxwell on Stat. 206). This was decided in *Kingsford v. G. W. Ry. Company*, 16 C. B. N. S. 761 (1864), the ground being that it was the intention of the Legislature that its benefits should be extended to all suitors. In that case Willes, J. (p. 769) says: "All that the Court decided in *Christopherson v. Lotinga* is . . . that distance and inconvenience are not ground for dispensing with the affidavit of the party, . . . or to speak more correctly, that the Legislature cannot have intended to make an exception when the making of an affidavit by that party is extremely inconvenient, it being still possible." This case is referred to with approbation in *Tiffany v. Bullen*, 18 U. C. C. P. 97. A curious question arises as to whether the same indulgence should be granted to corporations under R. S. O. c. 50, sec. 71, which provides for the giving of security for costs in *qui tam* actions. The section enacts that the application is to be made "upon an affidavit made by the defendant applying." In the recent case of *Martin v. The Consolidated Bank* (not yet reported), Mr. Dalton held that an affidavit of the attorney of the corporation was not sufficient, on the ground that the statute did not extend to, and had not provided for, the case of a corporation. This decision was grounded mainly on the case of *Bank of Montreal v. Cameron*, 2 Q. B. D. 536, and stands enlarged before the full

Court. The last-named case was on Order XIV., Rule 1 (Judicature Act); which says that, when the defendant appears on a writ of summons specially endorsed, the plaintiff may, "on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action," call on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment for the amount endorsed. And it was held such an order cannot be obtained where the plaintiff is a corporation, because the Rule requires an affidavit to be made by the plaintiff himself as to his own belief. One of the judges, who had been concerned in framing the Orders, confessed that the framers had not had before their mind the case of corporations. Should Mr. Dalton's decision in *Martin v. The Consolidated Bank* be upheld by the full Court, it is to be hoped the Legislature will amend an obvious oversight in R. S. O. c. 50, sec. 71. It, for example, could never have been intended that if some worthless informer should proceed against a bank under 37 Vict. c. 47, sec. 3 (C), as was the case here, the defendant should be unable to obtain security for his costs.

CERTIORARI.

R.S.O. c. 43, sec. 24, enacts:—"Whenever it appears in any action otherwise of the proper competency of the County Court, that such Court has not cognizance thereof from the title to land being brought in question, &c., any Judge of either of the Supreme Courts of Common Law, or the Judge of the County Court before whom such cause is pending, may order a writ of *certiorari* to issue," &c. It may be useful to point out what appears to be the history of the enactment. In *Porley v. Whitehead*, 16 U.C.Q.B. 589, the defendant put in a plea, and annexed to it an affidavit, as required by 8 Vict. c. 13,

PRACTICAL JOTTINGS—FEMALE ATTORNEYS.

sec. 13 (R. S. O. c. 43, sec. 28). In the course of his judgment there, Burns, J., says:—"The course which the plaintiff should have pursued was, upon the plea in bar being put in, the trial of which could not take place in the County Court, to have removed the cause into the Superior Court by *certiorari*, and have proceeded with the case there." But in a later case, viz., *O'Brien v. Welsh*, 28 U. C. Q. B. 394, Wilson, J., advertg to *Powley v. Whitehead*, and other cases, discusses whether a plaintiff really could so act, and he says: "We cannot form any satisfactory opinion upon anything decided in this Province, nor can we find any English decision at all bearing directly on the question. . . . While the rule of law is, that, when the Court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and all parties are liable who act under it, it appears to us we cannot take up such proceedings and legalize them merely by transferring them to another Court which has jurisdiction. The jurisdiction founded on the void initiation must be as vicious as the process on which they rest. . . . We come, therefore, to the conclusion that when an action has been begun in a County Court which had jurisdiction to entertain it, *as well as when the action has been rightly begun there, but the jurisdiction has been lost by matter of pleading or of evidence upon the pleadings in the cause*, that the whole proceedings are *coram non judice*, and that they cannot be removed for the purpose of prosecuting the suit in the Superior Court which has jurisdiction in such an action." A few months after this expression of opinion, the above enactment was passed, doubtless with a view to putting the law upon a more satisfactory footing.

F. L.

FEMALE ATTORNEYS.

In our June number for last year we noticed the admittance of Mrs. Bella Lockwood to the roll of attorneys of the Supreme Court of the United States. Her's is the first female name on the roll of attorneys, and we naturally watch her career with interest. In another part of our June number for last year we recounted the severe lecture she received from Judge Magruder, upon attempting to act as attorney in his court, on which occasion, it will be remembered, she was informed, on judicial authority, that "the sexes are like the sun and moon moving in their different orbits. The greatest seas have bounds, &c., &c." Now June is round again, and Mrs. Bella Lockwood has again been brought to our notice. The *Chicago Legal News* informs us as follows:—

"There was a novel scene in the United States Supreme Court room on Monday. Joel Parker, of New Jersey, democratic candidate for presidential nomination, had just had his admission to the Bar of the United States Supreme Court moved, when Mrs. Bella Lockwood, who was admitted to practice before that court by special act in the last Congress, rose, and in a clear, audible tone moved the admission of a lawyer from South Carolina, who, she certified upon honour, possessed the necessary qualifications to practise before the Supreme Court of the United States. The lawyer whose admission she moved rose, and proved to be a negro. Joel Parker, democratic candidate for president, and this negro, then stepped forward to the clerk's desk, placed their hands on the same Bible, and were sworn in together, very near to the niche where the bust of Chief Justice Taney, the author of the Dred Scott decision is placed. The most visionary prophets of the last decade would scarcely have ventured to predict that a negro upon motion of a woman, who is a qualified counselor before that court, would have been enrolled among the counselors of the Supreme Court of the United States to-

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gether with a democratic candidate for the presidency."

Female aspirants for the Black Robe meet with far less encouragement in the region of Temple Bar, than they have received in America.

The *Solicitors' Journal* says :

"Almost simultaneously with the request by a young lady to be examined at the preliminary examination for solicitors, an application in writing from another lady has been received at one of the Inns of Court with reference to the preliminaries for call to the bar. The applicant has been informed that, under the regulations of the Inns of Court, ladies are not allowed to enter as students. With regard to the young lady candidate for the solicitors' examination, we are informed on authority that she has no intention whatever of presenting herself for examination in February next, in face of the reply of the Council of the Incorporated Law Society. That ungallant body, according to our correspondent, have definitely said that they do not feel themselves at liberty to accept the notice of any woman."

Perhaps, however, we need not exclaim *proh pudor* ! but should rather rejoice that the authorities in the mother-country, having convictions, have the firmness to abide by them. As conveyancers, or as compilers of text-books, there may be no reason why some women should not succeed as well as some men : but to refuse to allow them to embark upon the rough and troubled sea of actual legal practice, is, as it appears to us, being cruel only to be kind.

EXPERT TESTIMONY.

The value of expert testimony appears to be the subject of a good deal of discussion just now, and it does not require a prophet to anticipate, before long, the introduction of new regulations in regard to it. In October last, the correspond-

ent of the *Times* at Naples wrote as follows :—

"In several recent letters I have noted it as a flagrant defect in the administration of justice in Italy that the plea of '*impulso irresistibile*' is so often urged in extenuation of crime—so often, indeed, that it has awakened the attention of the press and of some of our most distinguished medical men. Professor Tomassi, whose name is well known throughout Europe, announced at an early meeting of the congress of medical men assembled in this city that he would bring the subject forward for their consideration, and this he did at the closing meeting. He had observed, he said, in criminal cases, the introduction of a practice of late, which is *inqualificabile* in the presence of justice, of science, and of common sense, and that is the selection of experts for the defence by the advocate, and experts for the accusation by the Attorney-General. Whether this distinction was sanctioned by the law, or had crept in from some abuse, he was not aware, but undoubtedly it was an enormity which ought to be abolished. The expert for the defence having been selected by the advocate, is almost under an obligation to find excuses for the prisoner at the bar, while the expert for the accusation, having been selected by the Attorney-General, is disposed to support the views of the legal authorities. Of what value, then, can be the addresses of men which are, or appear to be, obligatory ? It could not be denied that sometimes conscientious experts, and possessing much medical learning, may act differently, but such cases are rare ; in general, experts follow the lead of the advocates in excusing or accusing the prisoner. This cannot continue ; it is contrary to justice, to the dignity of medicine and of the magistrate. Certain statements which are made by advocates, especially those for the defence, are perfectly incredible. As remedies for this state of things, the Professor proposed, first, that in every province a body of experts should be instituted who had made legal medicine their special study, and who had undergone a corresponding examination, from whom, when there was any necessity, a selection should be made.

EXPERT TESTIMONY--NOTES OF CASES.

Secondly, that the distinction between experts for the accusation and the defence should be abolished; that they should be selected by the advocate for the defence and the Attorney-General conjointly, and the number required should be drawn by lot. I may have trespassed too much on your space in bringing this subject before you, but any one who has watched the proceedings of criminal courts in Naples, and has noted the excuses for crime which are urged almost as a matter of course, will acknowledge the importance of the question. That it has been brought to the attention of the public by such a man as Professor Tomassi, at a congress of the medical men of Italy, is certain to insure some reform. Had his proposals at the time been the law, we should not have such ridiculous exhibitions of so-called medical science on the occasion of the trial of the cook of Salerno, the would-be assassin of the King. Nor would our courts be so frequently disgraced by the often unjustifiable plea of '*forza irresistibile*.'"

And in a recent issue, the Albany *Evening Times*, in commenting upon the opinion of Surrogate Calvin, in relation to the weight to be given to expert testimony, says:—

"The actual value of experts in legal trials continues to receive merited attention. The drift of public opinion coincides with that of the *Evening Times*, as published a few days since. We then said, that as experts only favour the side that calls them, they are of little or no value to courts or juries as aids in administering justice. Surrogate Calvin, in the hearing of the Hedra will case in New York on Saturday last, expressed a similar opinion, after an exhibition of experts regarding the genuineness of a certain signature.

The surrogate said that he was becoming more and more convinced of the dangerous character of expert evidence. It invariably happens that the expert's testimony supported the theory of the side by which he was retained, and it was as little to be expected that any expert's evidence would not help those by whom he was paid, as that

a lawyer would give an argument or opinion in court contrary to the interests of his client. The result was that the expert's opinion had come to have about the same value as that of the lawyer.

The surrogate thought that this might be cured by a law which should make skilled experts officers of the court instead of servants of parties. The court might then name three experts to be agreed upon, who should not be retained by either side, but who would decide the question brought to them for decision without regard to the effect upon the case. Their pay would not be contingent upon the success of either side, and they would be under the same restrictions and control as a referee now is."

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

QUEEN'S BENCH.

VACATION COURT.

Hagarty, C. J.]

[May 7.]

IN RE BIRDSALL ET AL. AND THE CORPORATION OF THE TOWNSHIP OF ASPHODEL.

Municipal corporations — By-law to close road — Insufficiency of notice — Application to quash.

Held, that the notice of intention to pass a by-law to close a road should state the day on which the Municipal Council intended considering the by-law.

Semble, that actual knowledge on the part of a relator of the day on which the by-law was to be so considered did not disqualify him where he was a party interested, from moving to quash.

Bethune, Q. C., for relators.

Marsh, contra.

Galt, J.]

[May 11.]

FRYER V. SHIELDS ET AL.

Action for wages — Discharge in insolvency — Pleading.

To an action by the plaintiff, a clerk of defendants, for the full amount of his wages,

Chan. Ch.]

NOTES OF CASES.

[Chan. Ch.]

defendants pleaded a deed of composition and discharge in insolvency, to which the plaintiff replied that the claim was privileged.

Held, on demurrer, replication good, as it did not appear that the plaintiff ever gave any express consent to the discharge of the defendants, and was not therefore bound by it.

Mulloch, for demurrer.

G. Kerr, *contra*.

CHANCERY CHAMBERS.

GODFREY v. HARRISON.

Referee.]

[March 3.

Where a married woman married before the passing of 35 Vict. c. 16 (2nd March, 1872) files a bill in respect of property, whether acquired before or after that date, she is required to sue by a next friend.

Shelley v. Gering, 8 Pr. Rep. 35, explained.

RICHARDSON v. RICHARDSON.

Proudfoot, V. C.]

[17th Feb. 1879.

Spragge, C.]

[10th March, 1880.

Pending an alimony suit and before decree, a writ of *ne exeat provincia* was issued against the defendant. Two parties were joined as sureties on the bond, which was the usual statutory one, and \$450, the sum at which the defendant was held to bail, paid to the sheriff by one of the sureties as collateral security. The defendant was surrendered to the sheriff, and then applied for his discharge, which was granted, but so as not to prejudice the liabilities of the sureties. The sureties now applied for their discharge, and that the sum of \$450 be repaid.

Held by PROUDFOOT, V.C., that, under the state of the authorities, no order should be made for the discharge of the sureties, and that the \$450 should not be repaid to the surety who paid it, as the other surety only signed the bond on the condition of that deposit.

The plaintiff afterwards applied for pay-

ment to her of the \$450 in the sheriff's hands, on account of arrears of alimony.

Held by SPRAGGE, C., that where a party is entitled to an assignment of the bond and to realize it for his own benefit, his rights will be the same in regard to money deposited, and that plaintiff is entitled to have money paid into Court and applied as asked for. Costs against the surety who had paid the \$450 to the sheriff.

Spragge, C.]

[March 10.

FRASER v. LUNN.

Vendor and purchaser.

At a sale on the 25th March, 1879, under a decree, Wesley Abel purchased the land in question.

On the 19th April, 1879, he transferred his interest to Peter Wood, and on the 26th April Robert Hunter purchased and took an assignment of the dower of one Barbara Stewart in the land.

On the 16th February, 1880, Abel applied to the Court to be relieved from the contract to purchase on the ground of the outstanding dower.

Held, assuming the evidence of the application to show that Barbara Stewart had agreed with the heir at law of the vendor to accept a gross sum in lieu of her dower; that Wood really purchased her dower but took the assent in Hunter's name, and that this application, though in Abel's name, was really made by Wood—that no relief could be granted, the applicant having himself created the obstacles by means of which he sought to prevent the sale being carried out.

He who comes into equity must come with clean hands.

Robertson, Q. C., for applicant.

Teetzel, *contra*.

Blake, V. C.]

[May 3.

RE HEYWOOD.

Infant—Maintenance—Guardian.

In 1875, Margaret H., the mother of certain infants herein, died, directing by her will that her property should vest in trustees, who should invest same and pay the interest to the guardian named in the will or

to such guardian as the Court might appoint, except the father of the infants, and if the Court appointed the father guardian the interest was to accumulate until the infants came of age. The infants resided with their aunt (the petitioner) and had so resided from shortly before their mother's death. Their father never claimed their custody. The guardian named in the will received the interest from the trustees till 1878, when he refused to act, and thereupon the trustees refused to pay any interest till a guardian was appointed by the Court. The aunt of the infants then applied by petition to the Court, on notice to the father, for an order declaring her entitled to be paid for past maintenance and to be appointed guardian of the infants.

The father did not appear on the application, and in his absence PROUDFOOT, V. C. granted the application.

H. Cassels, for petitioner.

The Referee, }
Proudfoot, V. C. } [May 17.]

MORDEN v. BOOTH.

Staying proceedings.

The defendant Stevenson demurred for want of parties to the plaintiff's bill.

Demurrer allowed with liberty to plaintiff to amend within 14 days and on payment of costs of demurrer, and if bill not amended within the 14 days that plaintiff should pay defendant costs of suit.

The plaintiff then moved before the Referee for an order extending the time for amending bill until after the rehearing of the order made on the demurrer, and until 14 days after judgment on such rehearing, and for a stay of proceedings under the order of Blake V. C. in the meantime.

The Referee refused the application on the ground that he had no jurisdiction to stay proceedings other than those to enforce the payment of money, following *Campbell v. Edwards*, Prac. Rep. 159, and *Butler v. Standard*, 6 Prac. Rep. 41.

On appeal, PROUDFOOT, V. C., reversed this decision, holding that the Court has jurisdiction in any proper case to stay pro-

ceedings, and under recent legislation that power is conferred on the Referee.

H. Cassels, for defendant Stevenson.

T. H. Spencer, for plaintiff.

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ONTARIO.

IN THE COUNTY COURT OF THE COUNTY OF SIMCOE.

CURRIE v. L. McCALLISTER AND JAMES
RUSSELL.

Action against magistrate, for not returning conviction—Joint liability—Statute affecting tabulated and discussed—Declaration—Pleading.

[Barrie, Jan. Term, ARDAGH, J. J.]

This was a *qui tam* action against the defendants as Justices of the Peace, for not making a return of conviction. Defendants demurred to the declaration.

Lount, Q.C., for the demurrer.

Moberly, in support of the declaration.

The facts and other matters sufficiently appear in the judgment of

ARDAGH, J. J.—The plaintiff declares in a *qui tam* action against two defendants, claiming a penalty of \$80 for non-return of a conviction by them of one Peter Currie.

The defendants demur to the declaration on the following grounds:—

1. The defendants are not jointly liable.
2. The declaration is not founded on or authorised by any statute.
3. The declaration does not disclose the nature of the offence whereof the defendants convicted Peter Currie.
4. The declaration does not disclose that the defendants had jurisdiction.
5. The declaration does not allege that the conviction was a joint conviction.
6. The declaration does not aver that the return of the said conviction was not made contrary to the statutes in that behalf.

And on the argument, Mr. Lount further objected that the declaration did not state where the conviction took place, i. e., that it took place within the County of Simcoe,

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of which county the defendants were Justices of the Peace.

Some of these objections are, so far as I can find, new, that is, that upon them no decisions have ever been pronounced, as the law now stands.

In some of the cases cited at the argument, a difficulty seems to have arisen, as to what particular statute, whether a Dominion or Ontario one, the proceedings were founded upon.

Our earliest Act seems to have been the old 4 & 5 Vict. c. 12. This Act was incorporated into the C. S. U. C. chap. 124, and that Act (so far as the matter now in question is concerned) was repealed by the 32-33 Vict. c. 36, such repeal not extending to matters relating solely to subjects as to which the Provincial Legislature have, under the B. N. A. Act of 1867, exclusive powers of legislation.

In order more clearly to arrive at a conclusion as to what Acts, both of the Dominion and the Local Legislature, are now in force, I have tabulated all the legislation on the subject since Confederation, and subsequent to chap. 124 of C. S. U. C. above alluded to—premising first, that that Act required every Justice of the Peace (acting alone) to make a return of any conviction before him, to the then next General Court of Quarter Sessions; but, in the case of a conviction before *two or more* Justices, they were required to make an *immediate* return,—and (by section 2), *each and every* of them were liable to the penalty for non-compliance.

The subsequent *Dominion* legislation is as follows:—

32-33 Vict. c. 36 (1869), repeals chap. 124, C. S. U. C., except, as above stated, as to matters within the control of the Provincial Legislature.

32-33 Vict. c. 31 (1869), s. 76 of which required every Justice to make a return to the next General or Quarter Sessions, or to the next Court to which an appeal might be made—while *two or more* justices were to make a joint return—by sect. 78, such justice or justices, to forfeit and pay \$80 for neglect to return.

33 Vict. c. 27 (1870), by sect. 3 of which,

every justice was to make the returns required by sec. 76 of 32-33 Vict. c. 31, to the Clerk of the Peace, on or before the second Tuesday in the months of March, June, September and December. No alteration was made by this Act, as to the penalty, which therefore remains as before, a *joint* one against all the justices who might be guilty of neglect in making the joint return required to be made of any particular conviction.

This, then appears to be the present law, as regards the return of any conviction made under any Act of the Dominion Parliament.

Next, as to the Acts of the Ontario Legislature.

When Confederation took place, the law, as before stated was contained in chap. 124, C. S. U. C., and this Act was in force till the passing of

32 Vict. c. 6 (1868), sec. 9 of which required *all* returns to be made quarterly to the Clerk of the Peace, on or before the second Tuesday in the months of March, June, September and December—the penalty still remaining against *each and every* justice.

Rev. Stat. c. 76 (1877). In this Act, the time to make the returns was left as before—but *two or more* justices were to make an immediate return—and by sec. 3, such justice or justices neglecting to make a return, were to forfeit and pay \$80.

The declaration alleges the neglect of the defendants to make the return in question, under the provisions of chapter 76 of the Revised Statutes.

As to the first objection, that the defendants are not jointly liable, it will be seen on reference to the Act last mentioned, that the penalty is a joint one, the words “and each and every of them,” found in the old Act (chap. 124, C. S. U. C.), being now omitted. Under the old Act, the words permitted a separate action (as the cases shew) against *each* justice. The Dominion Legislature, while repealing chap. 124, re-enacted it by sec. 78 of chap. 31, 32-33 Vict., omitting however, the words, “and each and every of them,” thus apparently limiting the right of the informer to sue for a single penalty

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against them jointly, where more than one. Upon this Statute, was decided the case of *Drake v. Preston*, 34 U. C. R. 257, where Mr. Justice Wilson says, "As the act to be done is single in its nature, to make a return, for that can be only one return, a joint return, and if that be not done, the one forfeiture, the single payment of the penalty will acquit the two." As regards the Acts of both Legislatures then, I think the action must be a joint one, against all, where there is more than one justice. The right to sue each separately, under the Ontario legislation, existed till the passing of chapter 76 of the Revised Statutes, when it was taken away by the omission of the words "and each and every of them" (found in chapter 124 U. C. C. S) from section 3 of said chapter 76. So it appears, that whether the conviction was made by two or more justices, under a Dominion or an Ontario Statute, and they neglect to return the conviction, "such justices" (to use the words employed by both Legislatures) "shall forfeit and pay the sum of \$80." The action appears to be, therefore, rightly against both defendants, if they were present and joined in the conviction—though it was otherwise when *Drake v. Preston* (quoted in the argument) was decided—and so the remarks of Wilson, J., on page 265 of that judgment, as to the necessity for proceeding against the defendants separately, where the conviction was under an Ontario statute, have now no force.

Before we proceed to the next point, it may be well to arrange chronologically, the statutes above referred to, and the cases cited on the argument—this will enable us to see what particular statute was in force when each case was decided :

1. *Ontario*, 124 C. S. U. C. . . 1859
- " 32 Vict. c. 6 . . . 1868
2. *Canada*, 32-33 Vict. c. 31 . . 1869
- " 33 Vict. c. 27 . . . 1870
3. *Drake v. Preston*, ante . . . 1873 .
4. *Corsant v. Taylor*, 23 C. P. . . 1874
5. *Darragh v. Patterson*, 25 C. P. . 1875
6. *Rev. Stat. c. 76 (Ontario)*. . 1877

The second objection is, that the declaration is not founded on, or authorized by, any statute. In the face of what I have

already said, that the whole law on the subject is now consolidated in the Revised Statutes, chap. 76, and the declaration alleging the duty of the defendants to be under that statute, this objection must also be disallowed.

The third objection is, that the declaration does not disclose the nature of the offence whereof the defendants convicted Peter Currie.

The case of *O'Reilly v. Allen*, 11 U. C. R., decided that this was not necessary, and so did *Keenahan v. Egleson*, 22 U. C. R. 626. The point was raised in *Drake v. Preston*, *supra*, but not decided. When, however, that case was argued, a different return was required, and a different penalty imposed, as regarded neglect to return convictions for offences under Dominion and Local jurisdiction, respectively. Now there is no difference in the penalty; and no difference as to the return, except that, when made by two or more justices, the Ontario Act requires an immediate return, the Dominion Act does not. The declaration alleges the duty of the defendants, to be under Revised Statutes, chap. 76. In *Drake v. Preston*, *supra*, Mr. Justice Wilson, says: "It may be proper, under the different enactments of the two Legislatures, to shew the nature of the offence for and upon which the conviction was made, otherwise we shall not, in the case of two justices of the peace, know whether there is to be a separate penalty on each justice, or a single penalty against both for the one default, or whether they should be joined, or should not be joined, in the same action."

When we find, as above stated, that there is now no difference between the two legislations (except as to an immediate return by two or more justices) we must come to the conclusion that there need not now, in a case of this sort, be any statement as to the nature of the offence, any more than when *O'Reilly v. Allen*, *supra*, was decided. Until I see some further authority, I must consider this allegation not necessary—though, if no reference had been made to any particular statute, it might perhaps be necessary to consider the point further.

The fourth objection is that the declaration

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does not disclose that the defendants had jurisdiction. The declaration alleges that it was "a matter within the jurisdiction of the said justices." The objection, I take it, refers to the nature of the offence (inasmuch as the seventh objection is as to *place*). It is possible that plaintiff is unable to acquire all the information, to the absence of which the defendants object. They have all the means of knowing the facts, but making no return of the conviction—perhaps not returning the conviction itself, may be the very cause why plaintiff cannot allege all that they require, and it does not seem unfair to invoke against them the maxim, *omnia præsumuntur*, &c., in respect of their own magisterial duties—all the plaintiff may know is that defendants sitting in open Court assumed the right to sit upon a case, did sit upon and hear it, and did publicly make adjudication, both appearing to join in it, and both appearing to sign it. If Justices of the Peace undertake to lock up, so to speak, all the proceedings connected with such a case, and make no return respecting it, no one would be in a position to bring such an action as the present if too much minuteness were required—and thus the very mischief which the statute was intended to guard against, would constantly be effected. It might be said, too, that defendants are bound to make some return in the matter, even if it was one over which they had no jurisdiction, or that, if they had no jurisdiction, they should plead it in bar. At all events the plaintiff alleges they had jurisdiction. In the case of *Bagley v. Curtis*, 15 U. C. C. P. 366, it was held that defendant, having actually convicted and imposed a fine, could not except to the declaration, on the ground that it did not shew that he had jurisdiction to convict. Mr. Justice John Wilson, in his judgment, says, "The duty of the magistrate to make a return arises from the fact that he made a conviction, whether right or wrong, and if he neglect his duty to return it he incurs a penalty." In *Keenahan v. Egleston* (*supra*), the C. J. remarks, "it does not lie in the defendant's mouth to say he had no jurisdiction when he has actually convicted and imposed a fine. As against the defendant, the conviction affords evi-

dence that he claimed and exercised jurisdiction to convict and impose a fine, and having done so, it became his duty to make a return." See also *O'Reilly v. Allen* (*supra*).

The *fifth* objection is that the declaration does not allege that the conviction was a joint one. The words of the statute are, "two or more Justices, such Justices being present and joining" in the conviction. This, it appears to me, is directory, more than anything else, as to who are to make the return—that is, for instance, if there were a number of Justices present, but all did not join in the conviction, only those who so joined, would be required to make the return. If either of them could shew that he did not join in the conviction, and so did not come within the Act, he would be entitled to a verdict. To quote again from Mr. Justice Wilson in *Drake v. Preston*, "the act to be done is single in its nature, to make a return, for that can only be one return, a joint return." So where the declaration alleges a conviction by two, it may be said to be a joint conviction. Sec. 3 of the Act (R. S. O. chap. 76), which provides for the penalty, says nothing in reference to the Justices being present and joining in the conviction; but only sec. 1, which refers to the return to be made. The wording of the declaration is the same as that in *Drake v. Preston*, and no objection was taken to it there.

The *sixth* objection is that the declaration does not aver that the return of the said conviction was not made contrary to the *statutes* in that behalf. As there is only one statute now for Ontario governing such returns, and as that is set out in the declaration, the remarks I have made as to the second objection will apply here.

Lastly, as to the further objection, of which no notice was given to the Court, that the declaration does not state where the conviction took place—on looking at the declaration in some of the reported cases I find that the place is sometimes given, sometimes not—it may be they are not always set out in full. In consequence of the conclusion I have come to as to the fourth objection, I must also disallow this one, referring to the remarks there quoted from *Bagley v. Curtis*, and *Keenahan v. Egleston*. The

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defendants assumed jurisdiction, and even if they had none, I do not think they would be relieved from making a proper return of the conviction thus made.

Judgment for plaintiff on demurrer.

FOURTH DIVISION COURT, COUNTY OF ONTARIO.

POLLARD V. HUNTINGDON.

Chattel mortgage—Defective jurat.

The omission of the word "sworn" in the jurat to the affidavit of *bona fides* is fatal.

[Whitby, April 18th, 1880.]

This was an interpleader case, and the plaintiff claimed the goods under a chattel mortgage, which complied with the statute in every respect, except that in the *jurat* of the affidavit of *bona fides* there was a blank space, where the word "sworn" is usually placed.

DARTNELL, J. J.—I think the omission fatal, and that the reasons which governed the court in *Nesbitt v. Cook* (4 App. Rep. 200) apply with equal force here. The blank could have been filled in with the words "taken," "affirmed," "signed," "declared," "read over," or others of like nature, and it would be necessary here, as in the case cited, to call the Commissioner to prove what was actually done. The creditor is entitled to have on record complete evidence of the due and proper administration of the oath of *bona fides*. This is lacking here, and the plaintiff must fail. Independent of this the transaction in question is void under R. S. O. cap. 118, sec. 1.

Judgment barring the claimant with costs.

UNITED STATES REPORTS.

SUPREME COURT OF MISSOURI.

SMITH v. THE ST. LOUIS, KANSAS CITY, AND NORTHERN RAILWAY COMPANY, APPELLANT.

1. *Railroad Companies.—Duty to Employees as to Mechanical Appliances.*—Railroad Companies are bound to use appliances which are not defective in construction; but as between them and their employees they are not bound to use such as are of the very best or most approved

description. If they use such as are in general use, that is all that can be required. This principle is applied to the use of the T rail for a guard to railroad switches, it appearing that, although a guard made of U rail would be safer for employees and would answer the purposes of the Company equally as well, yet the T rail was the one in general use.

2. *Continued.—Knowledge of Danger.*—A brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of T rail, cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of a different rail it would have been less dangerous.

[*American Law Review*, 1880, p. 289.]

This was an appeal to the Supreme Court of Missouri from the Circuit Court of Jackson County. Hon. S. H. Woodson, presiding.

The case is stated in the opinion of the court.

Wells H. Blodgett, for appellant.

L. C. Slavens, for respondent.

HENRY, J. Plaintiff was employed as a brakeman by defendant, and, in attempting to uncouple some cars, was knocked down and his foot was run over by the car next behind him, inflicting an injury of so serious a nature as to render amputation of the leg above the knee necessary. He went between the cars while they were in motion, removed the coupling-pin, then went back to take out the link, and, while walking between said cars, his right foot outside, and his left foot inside of the rail, his left foot was caught and held fast between the guard-rail and that of the main track. It was thus that the accident occurred, and this action is to recover damages for the injury. The particular negligence alleged in the petition was, first, that the guard-rail was unnecessary where it was placed; and, second, that said guard-rail was constructed of railroad iron, known as the T rail, instead of a different kind of rail, which would have been as serviceable to defendant and less dangerous to its employees. The first ground was abandoned on the trial, and plaintiff, relying on the second, introduced evidence tending to show that a guard-rail of railroad iron, known as U rail, would have been as serviceable to the company and less dangerous to its servants; that, owing to the form of the U rail, his foot could not have been caught and held as it was in the T rail.

Donnelly, who testified for plaintiff, stated that the T rail is in general use in this country; that there are some U rails in use on the bridge at Kansas City; that he knew of no other place where that kind of rail was in use. Knickerbocker, for plaintiff, testified that he had had about twenty years' experi-

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ence in the construction of railroads, laying tracks, &c.; that he worked on the Illinois Central Railroad in 1854, and on an Iowa railroad in 1856, and subsequently on the Fort Scott and Hannibal & St. Joseph railroads; that he never had anything to do with any except the T rail; never saw the U rail; that he knew nothing of it but from the works he studied. The evidence showed conclusively that the T rail is that generally used, and that the U rail is but little used by railroad companies.

The plaintiff had been about six days in defendant's employment when the accident occurred. He had, before entering into defendant's service, been engaged three or four years on the Illinois Central, on which road the T rail was in use. He knew there was a switch at that place where he was injured, and that it was of T rail, and testified that generally there were guard-rails where there were switches, and could not say that he ever saw a switch without a corresponding guard-rail. J. M. Buckley and Mr. Emerson both testified to an experience in railroading of several years, on different roads, and to an acquaintance with the roads running into Kansas City, also the Illinois Central, the Pennsylvania Central, the Lafayette & Indianapolis, the New Albany & Salem, and others, and that they never saw any other than the T rail used in the construction of guard-rails.

For the plaintiff, the court instructed the jury as follows:—

1. If the jury find from the evidence in this cause that the guard-rail belonging to and used by defendant in operating its road, and carrying on its business as a part of said road or appurtenances, was, from the situation or construction thereof, unsafe for employes of said railroad company employed in operating said road, and that the same, *i. e.* said guard-rail, might have been so made, situated or constructed as could have answered as well all the uses of said defendant in operating its said road, and at the same time have been safe for its employes while engaged in the discharge of their duties in operating said road, and that the defendant knew this, or might have known it by the exercise of reasonable care and diligence, then the jury are instructed that the defendant is liable to the plaintiff for damages for any injuries which, from the evidence, they find he has received in consequence of such unsafe guard-rail, after such want of safety of the same was known, or, by the exercise of reasonable care and diligence, might have been known to the defendant; and provided, also, they believe from the evidence that plaintiff, when he received such injuries, was exercising ordinary care and diligence,

and did not know of such unsafety of such guard-rail.

2. If the jury find from the evidence in this case, that the guard-rail used by the defendant when the plaintiff was injured, was, from its make or construction, unsafe, and that defendant knew thereof, or might have known thereof by the exercise of reasonable care or diligence, and that plaintiff was injured by his foot being caught in said guard-rail, the jury are instructed that the defendant is liable to plaintiff for any injuries he has received in consequence of such defect in the make and construction of said guard-rail after it was known, or could have been known by the defendant; if they further believe that the defendant was exercising ordinary care and prudence at the time he received the injury, and did not know of the defect in said guard-rail in its make and construction.

The following, asked by the defendant, were refused:—

3. The plaintiff was bound to exercise such care and prudence as was commensurate with the danger of the employment in which he was engaged, and if you believe that, at the time of the happening of the injuries complained of, plaintiff was not exercising such care and prudence as was commensurate with the danger incident to his employment, when by the exercise of such care and prudence he could have avoided the injury, then he cannot recover in this action.

15. If the evidence shows that the defendant used, at the place where plaintiff was hurt, the most approved style or kind of tracks and guard-rails, and that the same were in general or universal use in this country, or this part of the country, and that the same were placed or located in the usual or approved methods in use by the best constructed and conducted roads of the country, then, in such case, the plaintiff cannot recover.

There is a perplexing confusion and conflict in the authorities with regard to the duty of a railroad company to its employes, in the matter of furnishing implements and machinery for them to work with. In some of the cases dangerous and defective machinery and implements are confounded. Machinery is not necessarily defective because dangerous. The most perfect steam-engine requires skill and care in its management, and is a dangerous agent. Circular saws, planing-machines, and nearly all machines used in wood-work are dangerous, but not, therefore, necessarily defective. This distinction must be kept in view in determining all questions which arise in suits for injuries received by em-

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ployés in using implements and machinery furnished them by the employer.

If the employer furnish defective machinery to an employé ignorant of a defect which was, or might have been, known to the employer by the use of proper care and vigilance, he is liable to the employé for any injury the latter may sustain in operating the machine with proper care on his part. This is all that was decided in *Porter v. The Hannibal & St. Jo. R. R. Co.*, 60 Mo. 162. As was said by Bacon, J., in *Warren v. Erie R. R. Co.*, 39 N. Y. 471: "We are not now dealing with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects, which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognise in the case of an employé, and which is answered if the care bestowed accords with that reasonable skill and prudence which men exercise in the transaction of their accustomed business and employments. *Levis Admr. v. St. Louis & Iron Mountain R. R. Co.*, 59 Mo. 530, is not in conflict with the foregoing views of the New York court in the decision of the question before the court. The plaintiff's intestate was a brakeman, and, in coupling cars, stepped along as they moved, partly forward and partly out toward the rail, until he reached the rail, when, taking a step sideways, to get clear of the rail, his right foot went into a hole, which caused him to fall, and in falling his left foot was caught by the wheel of the car, which ran over and crushed it. The hole had been dug by steamboat men for a purpose of their own, and had, to the knowledge of other brakemen, been there several days, and the attention of the section-foreman, had been called to it. The evidence tended to show that plaintiff's intestate was ignorant of its existence. The principal question in the case was whether the instruction for plaintiff was correct, which declared that defendant was responsible if the risk of injury to the plaintiff was increased by the hole being there, and it was allowed to remain after defendant knew of its existence, or might, by the exercise of reasonable diligence and care, have known thereof, and that the injury was received in consequence of the hole remaining after defendant knew or might have known of its existence. Upon the hypothetical case thus put to the jury, no doubt could be entertained of defendant's liability. The instruction was proper, and the court so held, but the principle controlling that case is

wholly inapplicable to this. In discussing the questions involved in that instruction, Wagner, J., who delivered the opinion, remarks: "The rule has long been established, and is founded in reason and justice, that it is the duty of railroad companies to keep their roads and works, and all portions of their track, in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passenger, or servants, or others. They are bound to furnish a safe road and sufficient and safe machinery or cars. The legal implication is that the roads will have and keep a safe track, and adopt all suitable instruments and means with which to carry on their business." This paragraph of the opinion is relied on by respondent, and, if it is to be taken literally, without qualification, it furnishes some support to the doctrine announced in plaintiff's first instruction. What is meant by a safe track is not very clear. An absolutely safe track is one on which no accident could occur attributable to the track. On the best roads in construction and management accidents do occur, and a strictly safe track is nowhere to be found. The remarks we have quoted, taken literally, without qualification, are disapproved.

The plaintiff who avers must prove negligence. Is the fact that there is another kind of rail, of which a guard-rail might be constructed which would be safer for employés, and would equally answer its purpose, sufficient to render the company liable to an employé for injury received by him in consequence of the failure of the company to use that other kind of rail? Is proof of that fact proof, or any evidence, of negligence on the part of the company? Plaintiff's first instruction declares that it is. Wharton, in his *Law of Negligence*, section 213, says: "An employer is not required to change his machinery in order to apply every new invention, or supposed improvement in appliance, and he may even have in use a machine, or an appliance for its operation, shown to be less safe than another in use, without being liable to his servants for the non-adoption of the improvements; provided the servant be not deceived as to the degree of danger that he incurs." Again, in section 244: "When an employé, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure. Hence, to turn specifically to the consideration of the employer's liability, an employé who contracts for the performance of hazardous duties, assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of

which causes he has had opportunity to ascertain." The authorities cited by him in support of these propositions fully sustain the text. Take the case of an engineer who for years has been operating just such an engine as that he is employed to run, and is injured by an explosion which would not have been so likely to occur if an improvement or appliance had been furnished by the employer, in use elsewhere, would the employer be liable to him in an action for damage, because he had not furnished such improvement or appliance? If the railroad companies are required to take up their rails whenever a better rail is manufactured, because it would afford greater security to their employes, and to discard their machines whenever a more perfect machinery is invented, or be liable to any employe who may be injured in using the old machinery, it would impose upon them pecuniary burdens which would compel them to suspend the operations of their roads.

In *Winder v. The Baltimore & Ohio R.R. Co.*, 32 Md. 411, the court remarks: "In the case before us, the question depending upon a diversity of opinion as to whether the eye-bolt or the hook is the better mode of fastening the brake is immaterial, as both seem to be approved appliances, tested by trial and experience; and if it were conceded that the eye-bolt has superior merits, it by no means follows that the defendant was bound to discard the hook that had been used for a long time and on so many trains without accident. A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliances, and he may even have in use a machine or an appliance for its operation shown to be less safe than another in general use, without being liable to his servants for the consequence of the use of it. If the servant thinks proper to operate such machinery, it is at his own risk, and all that he can require is that he shall not be deceived as to the degree of danger that he incurs." Wood, in his *Law of Master and Servant*, says, section 331: "The employer is not bound to employ the latest improvements in machinery, and is not liable for an injury which might have been avoided if such improved machinery had been in use."

In *T. W. & W. Ry. Co. v. Asbury*, 84 Ill. 434, which was an action by his administrator to recover damages for an injury received by an employe, the court remarked: "They (railroad companies) are not required to seek and apply every new invention, but must adopt such as are found, by experience, to combine the greatest safety with practical use." That case goes

far enough in that direction, and we think too far, in regard to the duties it exacts of the employer to the employe. The principle announced in the above extract applies to the relation of carrier and passenger, but is more exacting of the companies, with respect to employes, than we think warranted by the authorities. There is no fault to be found with what was decided in the case. It is an authority, we think, against this plaintiff's first instruction, considering the evidence in the cause. Even the doctrine announced in the paragraph quoted from that case will not sustain the judgment in this. The evidence does not show that the U rail "has been found by experience to combine the greatest safety with practical use." Reason and the weight of authority alike condemn the first instruction given for the plaintiff. The liabilities of railroad companies to their passengers, and their liability to their employes, are to be distinguished, as in *Warren v. The Erie R.R. Co.*, 39 N.Y. 471, and *Tinney v. The Boston & Albany R.R. Co.*, 62 Barb. 218. The highest degree of diligence is required in the one case, and the lowest standard in the other.

Applying these principles to this case, what right has plaintiff to recover from the company? He was an experienced railroad man, thirty-five or forty years of age, had worked for years on railroads constructed as defendant's was. He had never seen any other than a T rail used. He knew that the guard-rail was at the place where he was injured, and that it was made of T rail. This was his own testimony, and he proved by other witnesses that the U rail would have been less dangerous, although it was but little used in this country; his own witnesses stating that the most they knew of the U rail they had learned from books, and not from observation. This, with evidence of the particular manner in which he received the injury already detailed, and the extent of his injury, was the case made by the plaintiff, and his evidence neither proved, nor had any tendency to prove, negligence on the part of the defendant which made it liable in damages for the injury plaintiff received. The instruction asked by defendant at the close of plaintiff's evidence, that it was not sufficient to warrant a verdict for plaintiff, should have been given. The first instruction for plaintiff, as already indicated, was also erroneous. Defendant's third instruction should have been given if there had been any evidence tending to show carelessness on the part of plaintiff, but there was none.

We think that under the circumstances of this case, the fifteenth instruction asked by defendant should have been given. The

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evidence showed that the plaintiff was fully acquainted with the risk he incurred from the nature of his employment and the kind of rails used for guard-rails on defendant's road. It might not be a proper instruction in a case where the employé was inexperienced and ignorant of the danger he incurred in the work he was employed to perform. The judgment is reversed. The other judges concur.

Reversed.

Comments on the foregoing case, by Editor of American Law Review.

As indicated in the foregoing opinion, there are cases holding otherwise; but they ignore the general principles founded in reason and justice, which the English and American courts have generally agreed upon as governing the master's liability to his servant.

§ 2. *The governing principle stated.*—The governing principle of all such cases is this: The servant, when he enters into the service, is deemed to agree with the master that he will assume all risks which are ordinarily and naturally incident to the particular service. On the other hand, the master impliedly agrees with the servant that the former will not subject the latter, through negligence, fraud, or malice, to risks greater than those which fairly and properly belong to the service in which he is about to engage. If, without the consent of the servant, express or implied, the master subjects him to risks beyond these, and he is thereby injured, the master must pay to him the resulting damages. The negligence for which the master may be thus liable to the servant is generally classified under three heads:—

1. Negligence in subjecting the servant to the risk of injury from defective or unsafe machinery, buildings, premises, or appliances.

2. Negligence in subjecting him to the risk of injury from unskilful, drunken, habitually negligent, or otherwise unfit fellow-servants.

3. Negligence where the master or his vice-principal personally interferes, and either does or commands the doing of the act which caused the injury.

For the purpose of this discussion, negligent injuries of the third class may be left entirely out of view. In the first two cases, the unfitness of the building, premises, machine, appliance, or fellow-servant, must have been known to the master, or must have been such as, with reasonable diligence and attention to his business, he ought to have known. It must also have been unknown to the servant, or such as a reasonable exercise of skill and diligence in his department of service would not have discovered to him.

If the master has not been personally negligent in any of these particulars, and hurt nevertheless happens to the servant, the master will not be answerable in damages therefor; but the servant's misfortune will, accordingly as the facts appear, either be ascribed to his own negligence, or ranked in the category of accidents, the risk of which, by his contract of service, he is deemed voluntarily to have assumed.

The master's obligation is not to supply the servant with safe machinery, with machinery not defective, or with any particular kind of machinery; but it is an obligation to use ordin-

ary and reasonable care not to subject him to unreasonable or extraordinary dangers, such as he did not impliedly agree to encounter, by sending him to work in dangerous buildings, on dangerous premises, or with dangerous tools, machinery, or appliances. If the master has failed in his duty in this respect, and the servant has, in consequence of such failure, been injured, without fault on his part, and without having voluntarily assumed the risk of the consequences of the master's negligence, with full knowledge, or competent means of knowledge, of the danger, he may recover damages of the master.

§ 3. *Degree of care exacted of the Master.*—In the preceding case the learned judge correctly says that the liability of railroad companies to their passengers, and their liability to their employés, are to be distinguished. But the statement that "the highest degree of diligence is required in the one case, and the lowest standard in the other," is, to say the least, an extraordinary statement. If railroad managers were to get the impression that this is the law, it would tend greatly to lessen the security of the lives of their employés. We do not believe that any well-considered case can be found which contains even a dictum which lends support to this statement. The lowest standard of care which we can imagine one person as owing to another is that which one person may be supposed to owe to another who, at the particular time, is committing an aggravated trespass upon his rights. Trespassers, whether men, children, or dumb beasts, cannot be injured with impunity; and while the person upon whom the trespass is being committed may use the necessary force to expel the trespasser, he is under an obligation to use reasonable care not to inflict another or greater injury than that which may result from the application of this necessary and reasonable force. The rule is undoubtedly as firmly settled as any rule can well be, that a carrier of passengers is bound to exercise, to promote the safety of those whom he undertakes to carry, a very high degree of care. Whatever may be said against the soundness of dividing care, or its antithesis, negligence, into degrees, we must ignore the teaching of all the adjudications before we can reach the conclusion that the carrier of passengers is held only to the exercise of ordinary care. We must do the same in order to reach any other conclusion than that, in order to avoid subjecting his servants to risks beyond those which he impliedly agreed to assume, the master must exercise reasonable and ordinary care. He duty of selecting and maintaining safe machinery and competent servants is not an absolute one. He is not an insurer of the safety of his servants in this respect. He does not warrant the competency of his servants or the sufficiency of his machinery. His duty to them is discharged by the exercise of reasonable or ordinary care; and this, as in every other situation, is measured by the character, the risks, and the exposure of the business.

He is not bound even where the element of skill or art comes in, as against a workman without special skill, to exercise exhaustive care or the highest degree of diligence.

The test of liability is therefore said to be, not whether the master omitted to do something which he could have done, and which would have prevented the injury, but whether he did any thing which, under the circumstances, in the exercise of care and prudence, he ought not to have done, or omitted any precaution which a prudent

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and careful man would have taken. Accordingly, where it appeared that the servant was killed by the fall of a portion of an overhanging bank of earth, which was being excavated under the direction of the master, it was held error to charge the jury to the effect that if the defendant *could have done anything* which would have prevented the accident, his omission to do so was negligence.

Tested by the same rule, it has been held, with obvious propriety, that a declaration in an action by a railway engineer for injuries sustained in consequence of his engine running off the track, which merely alleges that the engine "ran off the track in spite of the reasonable care and diligence of the plaintiff, and which running off was in consequence of the imperfect and insufficient connection of the track where the said track crossed other tracks, the defendants being bound to keep said track in good running condition," is bad on demurrer, because it fails to allege negligence on the part of the defendant, and asserts an absolute duty to keep its track in good repair.

The master is under the continuing duty of supervision and inspection. He does not discharge his duty in this regard by providing proper and safe machinery, or fit servants, in the first instance, and then remaining passive. "It is a duty to be affirmatively and positively fulfilled and performed." He must supervise, examine, and test his machines as often as custom and experience require. The same care requisite in hiring a servant in the first instance must still be exercised in continuing in the service; otherwise the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant whom he continues in his employment after a knowledge of such incompetency or carelessness, or when, in the exercise of due care, he should have known it, as if he had been wanting in the same care in hiring. The same may very properly be said of the machinery. The servant has no more control of the repairs than of the purchase—no more responsibility for the one than for the other. The use of it is for him; and the risk of that use, whatever it may be, he assumes. That comes within his contract; but, as part of the same contract, the employer provides the means of carrying on the business, and, as a matter of course, he assumes the responsibility that his work shall be done with due care; and as the responsibility continues so long as the means are used, so must the same be exercised in keeping the required means in the same safe condition as at first.

Upon the question whether the master has exercised reasonable or ordinary care in the discharge of his duties towards his servant, it is obvious that his *knowledge*, or want of knowledge, of the thing which subsequently caused the injury to the servant will sometimes have a very important bearing. But it by no means follows that the want of knowledge will exonerate him. He being under an affirmative duty of inspection and inquiry, negligent ignorance will operate to charge him the same as knowledge.

§ 4. *When the Servant is deemed to waive the Danger or Defect.*—Juries are frequently misled by the habit of courts in charging them concerning this obligation of the master, without at the same time bringing to their attention the correlative duty of the servant. In ordinary cases (for there are exceptions), they should be told that to authorize a recovery these two things must stand in conjunction,—knowledge on the part of the master, or its equivalent, negligent

ignorance; and a want of knowledge on the part of the servant, or its equivalent, excusable ignorance. The general rule here is, that if the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover that the building, premises, machine, appliance, or fellow servant, in connection with which or with whom he is to labour, is unsafe or unfit in any particular; and if, notwithstanding such knowledge or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him. "Much of the work of the country is done without the employment of the best machinery or the most competent men, and it would be disastrous if those prosecuting it were held to insure the safety of all who enter their service. If persons are induced to engage, in ignorance of such neglect, and are injured in consequence, they should be entitled to compensation; but if advised of it, they assume the risk. They contract with reference to things as they are known to be, and no contract is violated and no wrong is done if they suffer from a neglect whose risk they assumed. *Volenti non fit injuria.*" It may be stated as a general proposition that the master is under no higher duty to provide for the safety of his servant than the servant is to provide for his own safety. It follows that, if the knowledge or the ignorance of the master and that of the servant in respect to the character of the machine are equal, so that both are either without fault or in equal fault, the servant cannot recover damages of the master. But this rule can only be predicated of cases where the servant and the master have equal means of knowledge; for though the servant and the master be equally ignorant, yet if the servant be ignorant without fault, and the master be negligently ignorant, the servant will have a cause of action against the master. In these cases the real question then is, whether the servant has had equal opportunities with the master to observe the defect in the machinery or the materials, or whether, having had such opportunities, he intends to waive any objections to them. This is well illustrated by a case in Illinois, where it appeared that a railway switchman and car-coupler was constantly employed in running damaged cars to the shop for repairs. While so engaged, in attempting to couple such cars, he was thrown to the ground and killed. It was held that the rule that the master must furnish the servant with safe machinery had no application; that the deceased must be deemed to have accepted the service subject to all the risks involved in it, among which was the risk of such an injury as that which caused his death. Moreover, the existence of a damaged car, under such circumstances, implied no negligence on the part of the company. These principles are subject to material exceptions and qualifications in favour of the servant, which we could point out if we had space; but it is not necessary, because the discussion in the principal case is so framed as to draw in question only the obligation of the master, and not the contributory negligence of the servant.

(To be continued.)

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The following questions and answers are taken from the *Bar Examination Journal*, published by Stevens & Haynes. The answers are given in *extenso* as they will be useful in giving some of our young friends an idea of how similar questions should be answered when their time comes to go through the ordeal at Osgoode Hall:—

COMMON LAW.

PASS PAPER.

Q.—1. *State and explain the principal rules to be observed in the construction of contracts.*

A.—(1.) The construction must be reasonable, that is, according to the apparent intention of the parties; e.g., if a party to a contract promise payment, without saying to whom, it is to be understood that he promised payment to the party from whom the consideration for the promise proceeded.

(2.) The construction must be liberal; that is, the words of a contract may be taken in their most comprehensive sense; e.g., the word *men* may sometimes be understood to include both men and women.

(3.) The construction must be favourable; that is, must be such as may, if possible, support the contract. Hence, if the words of a contract will bear two senses, one agreeable to and the other against law, the former sense is to be adopted.

(4.) Words are to be construed according to their ordinary signification; unless by usage or custom they have acquired a different meaning, or the context shows that they were not intended to be used in their ordinary sense.

(5.) A contract is to be construed with reference to its object and the whole of its terms; hence, the whole instrument must be considered, even though the immediate object of inquiry be the meaning of a single clause.

(6.) A contract is to be construed according to the *lex loci contractus* if it is to be performed in the country where it is made. If it is to be performed elsewhere, it is to be construed according to the law of the country where it is to be performed.

(7.) The construction is to be taken most strongly against the contractor. This rule, however, is only applicable where other rules of construction fail.

(8.) If there are two repugnant clauses in a contract the first is to be received and the latter rejected.

(9.) The construction of a written con-

tract belongs to the Court alone; but the jury have to determine, as a matter of fact, any question as to the meaning of the words in which it is expressed.

(10.) As a general rule parol evidence is not admissible to assist the Court in construing a written contract; but it is admissible in the case of a latent ambiguity; also to explain the meaning of words used in a particular sense in trade, art, or science, or words written in a foreign language; and to prove the existence of a local custom or custom of trade by which the contract is governed. (*Chitty on Contracts*, ch. 1, sec. 3; as to parol evidence, see *Bar Ex. Journal*, Vol. IV. p. 236, No. 23.)

Q.—2. *Give instances of contracts void on the ground of contravening public policy.*

A.—Marriage brokerage agreements, that is, agreements for the procuring of marriages; agreements not to marry, where the intention is to restrain marriage altogether; agreements made in contemplation of the future separation of husband and wife; agreements made with a view to compromising prosecutions for felonies and misdemeanours; agreements in general restraints of trade; agreements involving champerty and maintenance. (For other instances, and on the subject generally, see *Pollock on Contracts*, 2nd ed. 273—317.)

Q.—3. *Explain the nature of a contract of guarantee, showing how the surety may be discharged from his liability.*

A.—A contract of guarantee is an agreement whereby the promisor becomes liable to the promisee to answer to the payment of some debt or the performance of some duty in the event of the failure of a third person, who is, in the first instance, liable for such payment or performance. (*Broom, C. L.* 5th ed. 377.)

It is of the essence of this contract that there should be some one liable as principal (that is, in the first instance); hence, where one person agrees to be responsible for another the former incurs no liability as surety if no valid claim ever exists against the latter. (*Lackeman v. Montistephens*, L. R. 7 H. L. 17; *Chitty on Contracts*, 475.)

Under the Statute of Frauds (sec. 4), no action can be brought on a contract of guarantee unless there be a note or memorandum in writing of the contract, signed by the party to be charged or his agent.

By 19 & 20 Vict. c. 97 (s. 3), the consideration for a guarantee need not appear in the note or memorandum required by the Statute of Frauds. But there must, of course, be a valuable consideration for the promise of surety, unless the contract be

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under seal; and the mere existence of the debt, default or miscarriage in respect of which the promise is given, is not a sufficient consideration.

A surety will be discharged from his liability: (1.) By any material misrepresentation or concealment whereby he has been induced to enter into the contract of suretyship; (2.) By the failure of an intended co-surety to execute the instrument of guarantee; (3.) By a release given by the creditor to the principal; (4.) By the liability of the principal becoming extinguished in any other way (except operation of law, as on bankruptcy, *Ex parte Jacobs*, L. R. 10 Ch. App. 211); (5.) By the creditor entering into a binding contract to give time to the principal, unless the creditor at the same time reserves his rights against the surety, so that the latter may at once pay the debt and proceed against the principal; (6.) By any material alteration (without the surety's consent) of the terms of the agreement between the creditor and the principal in respect of which the surety becomes bound; (7.) By the creditor giving up (without the surety's consent) any collateral securities held by him for the debt of the principal, in which case the surety will be discharged to the extent of the value of the surety given up.

Q.—4. Define a "common carrier," and the extent of his liability for goods entrusted to him,—showing how far he is protected by modern legislation.

A.—A "common carrier," is one who undertakes for hire to transport from place to place, either by land or water, the goods of such persons as may choose to employ him (*Chitty on Contracts*, 445).

By the Common Law a carrier was liable for loss or injury to goods by any cause except the act of God or of the King's enemies, or some defect in the goods carried (*Chitty*, 448; *Nugent v. Smith*, 1 C. P. D. 423); unless he limited his liability by a contract made for that purpose with his customer. A notice limiting the carrier's liability put up in his office, and shown to have come to the customer's knowledge, was formerly held to constitute such a contract; but the Carriers' Act, 11 Geo. IV. & 1 Will. IV. c. 68, provides that no such notice shall have any effect. And by the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, no special contract between the carrying company and any person as to the forwarding and delivering of any goods is to be binding unless signed by him or the person delivering the goods.

The common law liability of carriers by land was materially altered by the Carriers' Act, 11 Geo. IV. & 1 Will. IV. c. 68, under which the carrier is not liable for the loss

of or damage to certain articles specified in the Act, when the value exceeds £10, unless the value be declared at the time the goods are delivered to the carrier, and an increased charge, notified in the carrier's office, accepted by him. The Act, however, does not protect the carrier when he does not properly notify or demand the increased charge, or when the loss of or damage to the goods arises from his own misfeasance or the felonious acts of his servants.

The Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, limits the liability of Railway and Canal companies for loss of or damage to horses and other beasts to certain specified amount, unless the higher value is declared and an increased rate paid.

Carriers by sea are protected by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, from liability for loss caused by fire, or by the fault of any pilot where the employment of such pilot is required by law, or (as regards certain valuable articles) by robbery or embezzlement, happening without their privy or default, unless a notice in writing of the nature and value of such articles has been given to the master or shipowner. And by the Merchant Shipping Act, 1862, 25 & 26 Vict. c. 63, they are not liable in respect of injuries to ships or goods to an aggregate amount exceeding £8 per ton of the ship's tonnage where the loss or damage arises without their default or privy.

Q.—5. What is the origin and nature of the remedy by distress, and in what cases can it be resorted to?

A.—Distress is a legal mode of obtaining satisfaction for certain wrongs by the mere act of the party injured without action or suit in a court of justice. It was originally regarded as a remedy for wrongs which could not be redressed by ordinary process of law, owing to the courts of justice in early times being unable in many cases to effectually enforce their judgments. It consists in "the taking of a personal chattel out of the possession of the wrong-doer into the custody of the person injured to procure satisfaction for the wrong committed."

The remedy by distress is given by the Common Law for (1.) Recovery of rent in arrear, in which case chattels found on the premises subject to the rent may (with some exceptions) be distrained; (2.) Trespass by cattle, where a man finds on his land another's cattle *damage feasant*, that is, doing damage by treading down grass, &c., in which case the owner of the land may in general distrain them; (3.) Neglect of certain feudal duties, now of no practical importance.

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By statute the remedy by distress is given in certain special cases, for the recovery of duties and penalties imposed by Act of Parliament.

At Common Law goods and cattle distrained were merely held as a pledge or security for satisfaction of the debt or damages due; and this is still the law with regard to cattle taken *damage feasant*; but goods distrained for rent may now under the provisions of several statutes (2 W. & M. c. 5; 8 Anne, c. 14; 4 Geo. II. c. 28; 11 Geo. II. c. 19), be sold and the proceeds applied in satisfaction of the rent and charges. And goods taken under statutory powers of distress for recovery of duties and penalties may in general be sold. (See 3 Steph. Comm. Book 5 V. ch. 1.)

Q.—6. Under what circumstances will an action lie in respect of injury sustained through an act done in the exercise of statutory powers?

A.—An action will not lie if the act was authorised by the statutory powers and has not been done negligently. But an action will lie—(1.) Where the injury has been caused by negligence in the exercise of the statutory powers; (2.) Where the act done was beyond the scope of the statutory powers; (3.) Where the statute which gave the powers also created a special duty as to the manner in which they were to be exercised, and the act done is a breach of such duty; unless the statute has annexed to the breach of the duty a special penalty recoverable by the party injured, in which case, as a particular remedy is given by the statute, an action for damages will not lie.

Q.—7. In what cases will a plaintiff be compelled to give security for costs?

A.—(1.) Where he is permanently resident abroad. (2.) Where he brings an action for the recovery of land after he has been unsuccessful in a prior action for the same against the same defendant. (3.) Where the action is brought by a limited joint stock company and there is reason to believe that if the defendant is successful the assets of the company will be insufficient to pay his costs. (4.) Where the plaintiff in an action of tort, brought in the High Court, has no visible means of paying the defendant's cost in the action if he fail, and the action is not fit to be brought in the High Court; the plaintiff, in this case, being compelled to give security for costs, or to have the action remitted to the County Court. (5.) Where the plaintiff brings an appeal, and the Court of Appeal orders him to give security for the cost of the appeal. (Prentice, 99, 112, 213, 217; Foulkes' Action at Law, 107—110.)

Q.—9. What is the writ of habeas corpus ad subjiciendum? When will it be granted, and what is the procedure thereupon.

A.—The writ of *habeas corpus ad subjiciendum* is the writ which issues in case of illegal imprisonment or detention, for the purpose of effecting the deliverance of the person so imprisoned or detained. It is directed to the person who has the other in his custody, and commands him to produce the body of the person detained, with the true statement of the time of his caption and the cause of his detention. It lies to any part of the Queen's dominions not having a Court with authority to issue such writ and enforce its execution. (See 25 Vict. c. 20.) The writ is obtained by motion to a Superior Court or application to a Judge, supported by affidavits of the facts, and will be granted on sufficient ground for its issue being shown. The return to the writ is made by producing the person detained, and setting forth the grounds and proceedings upon which he is in custody. If the return presents a sufficient justification of the prisoner's detention, he is remanded to his former custody; if insufficient he is discharged.

The remedy by *habeas corpus* for illegal detention existed at Common Law; and was improved and extended by the Habeas Corpus Act, 31 C. II. c. 2, in cases of commitments on criminal charges, and by 56 Geo. III. c. 100, in other cases of detention of the person. The latter statute contains important provisions, enabling the Court to examine into the truth of the facts stated in the return to the writ. (Broom, C. L. 5th ed. 245—247; Steph. Comm. Book V. c. 12.)

Q.—10. Under what circumstances can goods which have been stolen, and sold by the thief be recovered by the owner from an innocent person.

A.—If the goods be sold by the thief otherwise than in market overt, the owner can recover them from any person into whose possession they have passed, even though he be an innocent purchaser.

Prior to the statute 7 & 8 Geo. IV. c. 29, goods sold by a thief in market overt could never be recovered by the owner of an innocent purchaser; except in the case of a stolen horse which might be recovered, unless it had been exposed in the market prior to the sale for an hour between ten in the morning and sunset, and certain particulars respecting it had been taken down by the bookkeeper; and, even then it might be reclaimed within six months on tender of the price paid for it in market overt (2 & 3 P. & M. c. 7; 31 Eliz. c. 12). And this is still the law as to the effect of a sale

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in market overt where the thief has not been convicted; but the statute 7 & 8 Geo. IV. c. 29, on conviction of the thief, the property in the goods now reverts in the original owner, who may recover them from any person in whose possession they may be found (7 & 8 Geo. IV. c. 29.)

Q.—11. *Enumerate the offences which are now excluded from the jurisdiction of quarter sessions, pointing out which of them are felonies?*

A.—(1.) Treason, murder, and every capital felony. (2.) Every felony which when committed by a person not previously convicted of felony is punishable by penal servitude for life. (3.) Every newly created offence, unless otherwise provided by the statute which creates the offence. (4.) Certain offences which do not fall under the above heads, the most important being the following *felonies*, viz., treason-felony, certain forgeries, setting fire to crops, &c., bigamy, abduction of women, stealing, &c., records of Courts, wills or title deeds of real estate, and offences against the False Personation Act, 1874—and the following *misdemeanours*, viz., offences against religion, perjury, subornation of perjury, concealment of birth, abduction of girls under sixteen, libel, bribery, certain conspiracies, pursuing game by night, certain fraudulent misdemeanours by agents, trustees, &c. (Harris, Cr. L. 295—297.)

THE English Law Students have been debating the following questions:—

(1) "When a will contains a devise of real property to a person in fee simple, and also a devise of the same property in fee simple, 'in case the first-named devisee does not dispose of the same, but not otherwise,' and the first devise lapses, will the second devise take effect?"

(2) "Is it desirable that women should be admitted to professions, and to a larger and more direct influence in public life than they now possess?"

(3) "Bequest of a sum of money to trustees on trust to repair certain tombstones therewith, and to pay the surplus to A. The first trust being void, is A entitled to the whole fund?"

(4) "Is it desirable to increase the number of national holidays?"

(5) "Should the English law which compels (a) ministers of religion and (b) medical men to give evidence of matters communicated to them in professional confidence be assimilated to the laws of the Continent which protect such communications?"

(6) Testator bequeaths residue of his estate to A, with gift over to B, "in case A

should die before he shall have actually received the same." A. dies fourteen months after testator without having actually received any part of such residue. Is A.'s legal representative entitled to the bequest?

(7) Is it desirable that the law should be altered thus:—No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband?

ACTS OF PARLIAMENT.

The following are the Acts of interest to the profession passed during the late session of the Parliament for the Dominion:—

An Act to repeal the Acts respecting Insolvency now in force in Canada.

(Assented to 1st April, 1880.)

An Act to provide for the salaries of two additional Judges of the Supreme Court of British Columbia.

An Act further to continue in force for a limited time "The Better Prevention of Crime Act, 1878."

An Act for the final settlement of claims to lands in Manitoba by occupancy, under the Act thirty-third Victoria, chapter three.

(Assented to 29th April, 1880.)

An Act to authorize making certain investigations under oath.

An Act further to amend the Acts respecting Dominion Notes.

An Act for extending the Consolidated Act of 1879, respecting duties imposed on promissory notes and bills of exchange, to the whole Dominion.

An Act to further amend "The Supreme and Exchequer Court Act."

An Act to amend the law of evidence in Criminal Cases, as respects the taking and use of depositions of persons who may be unable to attend at the trial.

An Act to amend the Act intitled "An Act respecting offences against the person," and to repeal the Act intitled "An Act to provide that persons charged with common assault shall be competent as witnesses."

An Act relating to interest on moneys secured by mortgage of real estate.

An Act for the relief of Permanent Building Societies and Loan Companies.
(Assented to 7th May, 1880.)

FLOTSAM AND JETSAM.

BOOKS RECEIVED.

THE PRINCIPLES OF THE LAW OF CONTRACTS, by Sir Wm. R. Anson—American edition. Chicago: Callaghan & Co.

A COMPENDIUM OF THE LAW OF EXECUTORS AND ADMINISTRATORS, by W. Gregory Walker. London: Stevens & Haynes.

NEW LAW DICTIONARY AND COMPENDIUM OF THE WHOLE LAW, by Archibald Brown. Second edition. London: Stevens & Haynes.

THE ELEMENTS OF JURISPRUDENCE, by Thomas Erskine Holland, D.C.L. Oxford: Clarendon Press.

FLOTSAM AND JETSAM.

As to the possibility of substituting for the gallows some form of death likely to be less painful, Dr. Henry Natchel, a distinguished French physicist, now in New York, says that the garrotte does not always kill the first time, and could not be made successful except in the hands of a skilful surgeon; that administering chloroform violently is very painful; that prussic acid in the eye does not always produce instantaneous death, and must be administered by a physician; that death by strychnine is sometimes accompanied by terrible convulsions and great pain; and that even electricity is not sure, for a man in England was struck by lightning and stripped of his clothing, and many bones were broken, and yet he survived it. "Hanged by the neck until dead" seems likely to remain on the statute books for the present.

As questions of precedence are now considered of much importance, and as it is rather difficult to ascertain how this matter stands as among the twenty-nine Judges occupying the bench in England, we copy the order as given in the *Solicitor's Journal*:

- (1.) The Lord Chancellor (who is placed above all Dukes, except Royal Dukes).
- (2.) Judges of the Judicial Committee (as Privy Counsellors).
- (3.) Chancellor of the Duchy of Lancaster.
- (4.) The Lord Chief Justice of England.
- (5.) The Master of the Rolls.
- (6.) The Lord Chief Justice of the Common Pleas.
- (7.) The Lord Chief Baron.
- (8.) The Lords Justices of Appeal.
- (9.) The Vice Chancellors.

(10.) The Puisne Judges of Queen's Bench, Common Pleas, and Exchequer, according to seniority of appointment.

(11.) Judge of the Court of Probate.

(12.) Judge of Court of Admiralty.

A lawyer's wit, sometimes, does more than enliven a dull hour in court. It so opens the eyes of the Judge that he sees with clearness a point that otherwise he would have ignored. An illustration of this penetrating wit once occurred at the trial of a sailor in a New England seaport.

The sailor, after having drunk to excess in a low saloon, had quarrelled with the landlord, and beaten him severely with a bottle snatched from the bar.

As the case admitted of no legal defence, the sailor's lawyer, putting in a plea of guilty, addressed himself to the court in order to secure as light a sentence as possible. He urged that the prisoner had acted under the influence of liquor—and very poor liquor at that.

"But, sir," said the court, not inclined to view the appeal with favour, "we are to consider the aggravated character of the offence. Your client admits he assaulted this man with a bottle."

"Yes, your honour," interposed the witty lawyer, "we admit all that; but I beg you to remember that this man first assaulted my client with its contents."

The court smiled at this unexpected point, and Jack got the benefit of it in a light sentence.—*Chicago Legal News*.

The *Law Times* says: The British jurymen is a personage of so much importance, that one hesitates to question the propriety either of what he does or what he says. At the risk of committing an impropriety, however, we refer to some remarks by a jurymen, who took part in a coroner's inquiry into the cause of death of a seaman of the Royal Navy in one of our southern seaport towns: The jurymen to a witness.—Are you an independent witness? Answer.—Yes. Juror.—By whose solicitation do you come here? Solicitor for one of the parties.—I protest against such an imputation. Juror.—I saw some witnesses come from your office. Solicitor.—There is no reason why I should not see witnesses before they come here. Juror.—I was surprised to see them march out of your office. Solicitor.—I have a right to examine any witness who comes and makes statements to me. This is a most improper imputation. Now, with all respect for this juror, it will certainly take the whole of the solicitors' profession by surprise, to learn that there is a reflection on a professional man, who takes down the

FLOTSAM AND JETSAM.

statement of a witness to an event, which afterwards results in legal proceedings, such statement being taken down during the progress of such proceedings. It will, no doubt, be something new to this scandalized jurymen to learn that nine-tenths of the witnesses in courts of justice have, before giving evidence, attended at a solicitor's office, for the purpose of a full note being taken of the evidence they intend to give. And there is something to be said for the witness to whom this jurymen referred, for it is an iniquitous thing to impute to a witness giving evidence upon oath, that because he has been seen to come out of a solicitor's office, such a circumstance tends to discredit his evidence. Really so much unbecoming fuss is sometimes made of jurymen, that if when exercising a little brief authority, they have an exaggerated notion of their functions as jurymen, it is not to be wondered at.

A lawyer writes to the *Law Times* as follows concerning conveyancing and English Grammar: "During the said term." I believe this phrase is not understood by everybody, and certainly not by the editors of "Woodfall's Landlord and Tenant," who have conceived some grim-gribber in its place, namely, these phrases, "during the continuance of the said term," and "during the continuance of this demise." The former phrase is found in the eleventh edition and the latter in the third edition of Woodfall. Will you, on behalf of good English writing, allow me to correct these gentlemen and all others who have erred through them, and so prevent in some measure these disgraceful phrases finding a place in every well-drawn lease. The word "during" is a verb (called by grammarians an adverb), and the same verb as "enduring;" but placed at the beginning of the sentence it is scarcely recognised as a verb. "The said term enduring," "the said term during," "enduring the said term" and "during the said term," all mean the same, and the last phrase is a beauty in the English language, because it is so rare. Of course it might be translated into Latin by the ablative absolute. The following is Messrs. Leyly & Co.'s blunder:—"Enduring the continuance of the said term." They will be surprised to hear that these phrases, "during the continuance of the said term" and "continuing the continuance of the said term," mean exactly the same thing, and that the former is a new-fangled arrangement of the wanton verbosity so dearly loved by the old school of conveyancers. Mr. Prideaux has always been content with the right phrase. The verb

is common enough in Chaucer, and in *Man of Lawestale* are these lines:—

And al his lust, and al his busy cure,
Was for to love her while his life may dure.

Of the verb "to dure" the present participle is the only remnant in use, and Messrs. Leyly & Co. are almost guilty of a sort of sacrilege in trying to push it out of use and placing it under a bushel of words.

Logan E. Bleckley, one of the associate justices of the Supreme Court of Georgia, resigned his seat on the bench on the 2nd inst. "In many respects," writes our regular Georgian correspondent, "he was the most extraordinary judge that ever sat upon the Supreme Bench in our State. His decisions evince great learning and research, and are clothed with a quaintness of phraseology which has made them favourite sources of quotation everywhere. He was born in the mountains of North Georgia, and still retains about his appearance something of the backwoodsman; but he is a true poet and a profound metaphysician as well as a great lawyer. In the language of Hallam, he 'scatters the flowers of polite literature over the thorny breaks of jurisprudence.' On the morning he delivered his last decision on retiring from the bench, he read the following lines. It may be added that in his letter to the Governor, Judge Bleckley based his resignation upon the ground (dictated by genuine modesty) of inability to discharge the duties of the office satisfactorily to himself, and of his failing health under the stress of the labours imposed by his position." The following are the lines referred to:

In the Matter of Rest.

BLECKLEY, J.

1. Rest for hand and brow and breast,
For fingers, heart and brain!
Rest and peace! a long release
From labour and from pain;
Pain of doubt, fatigue, despair—
Pain of darkness everywhere,
And seeking light in vain!

2. Peace and rest! Are they the best
For mortals here below?
Is soft repose from work and woes
A bliss for men to know?
Bliss of time is bliss of toil;
No bliss but this, from sun and soil,
Does God permit to grow.

They were ordered to be spread upon the minutes of the court.—*Central Law Journal*.

LAW SOCIETY, HILARY TERM.



Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 43RD VICTORIAE.

During this Term, the following gentlemen were called to the Bar, (the names are not in the order of merit, but in the order in which they stand on the Roll of the Society):—

GEORGE WHITFIELD GROTE.
 WILLIAM COSBY MAHAFFY.
 P. A. MACDONALD.
 WILLIAM LAWRENCE.
 WILLIAM LEIGH WALSH.
 JOHN J. W. STONE.
 COLIN SCOTT RANKIN.
 HORACE COMFORT.
 ALEXANDER V. MCCLENNAGHAN.
 MARTIN SCOTT FRASER.
 WILLIAM PATTISON.
 WM. REUBEN HICKEY.
 GEORGE MONK GREEN.
 JAMES THOMAS PARKES.
 MICHAEL J. GORMAN.
 HARRY EDMUND MORPHY.
 CHARLES AUGUSTUS KINGSTON.
 JOHN HY. LONG.

Special Cases.

JAMES C. DALRYMPLE.
 JOHN JACOBS.

The following gentlemen have been entered on the books of the Society as Students-at-Law and Articled Clerks:—

Graduates.

PETER L. DOBLAND.
 LEWIS CHARLES SMITH.
 MATTHEW M. BROWN.
 PETER D. CREECH.
 RUFUS ADAM COLEMAN.

Matriculants.

ANDREW GRANT.
 JAMES MACOUN.
 FRANCIS R. POWELL.
 JOHN TYTLER.
 THOMAS JOHNSTON.

Primary Class.

ROBERT VICTOR SINCLAIR.

HECTOR COWAN.
 WILLIAM BEARDSLEY RAYMOND.
 WILLIAM ALBERT MATHESON.
 ARTHUR B. MCBRIDE.
 FRANK HORNSBY.
 WILLIAM AUSTIN PERRY.
 JOSHUA DENOVAN.
 M. J. J. PHELAN.
 ARTHUR EDWARD OVERELL.
 ROBERT SMITH.
 HUGH MORRISON.
 JOHN MCPHERSON.
 AMBROSE KENNETH GOODMAN.
 J. A. McLEAN.
 THOMAS IRWIN FOSTER HILLIARD.
 RANALD GUNN.
 PHILIP HENRY SIMPSON.
 JOHN GRAEE.
 EDWARD A. MILLER.
 JOHN GREER.
 DANIEL FISKE McMILLAN.
 CHARLES ADELBERT CRAWFORD.
 FREDERICK ERNEST COCHRANE.
 WILLIAM PEARCE.
 ANDREW GILLESPIE.
 G. A. KIDD.

Articled Clerks.

G. R. VANNORMAN.
 E. M. YARWOOD.
 J. HEIGHINGTON.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

Ovid, *Fasti*, B. I., vv. 1-300; or,
 Virgil, *Æneid*, B. II., vv. 1-317.
 Arithmetic.
 Euclid, B. I., II., and III.
 English Grammar and Composition.
 English History—Queen Anne to George III.
 Modern Geography—North America and Europe.
 Elements of Book-keeping.

Students-at-Law.

CLASSICS.

1880 { Xenophon, *Anabasis*, B. II.
 Homer, *Iliad*, B. IV.
 Cicero, in *Catilinam*, II., III., and IV.
 1880 { Virgil, *Eclog.*, I., IV., VI., VII., IX.
 Ovid, *Fasti*, B. I., vv. 1-300.

DIARY—CONTENTS—EDITORIAL NOTES.

DIARY FOR JULY.

1. Thur...Long Vacation begins. Dominion Day.
4. Sun...Sixth Sunday after Trinity.
5. Mon...County Court Terms (except York) begin.
Heir and Dev. sittings begin.
7. Wed...General Simcoe, first Lieutenant-Governor of
Upper Canada, 1792.
8. Thur...Cyprus ceded to England 1878.
10. Sat...County Court Term ends.
11. Sun...Seventh Sunday after Trinity.
14. Wed...W. P. Howland, first Lieutenant-Governor of
Ontario, 1868.
15. Thur...Manitoba entered Confederation, 1870.
18. Sun...Eighth Sunday after Trinity.
20. Tues...Heir and Devisee sittings end.
23. Fri...Union of Upper and Lower Canada, 1840.
24. Sat...Canada discovered by Cartier, 1534.
25. Sun...Ninth Sunday after Trinity.
26. Mon...Jews first admitted to House of Commons,
1858. Dr. Robitaille, Lieutenant-Governor
of Quebec, 1879.
29. Thur...First Atlantic Telegraph laid, 1866.
30. Fri...Government of Upper Canada removed from
Niagara to York, 1793.

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Canada Law Journal.

Toronto, July, 1880.

Why does not some industrious young man in the profession make an Index to the Revised Statutes? That which goes under that designation at the end of the second volume is almost as bad as that attached to the old Consolidated Statutes. We are inclined to think that a really good Index, either to *each* volume or to the whole, one to be bound up with each, would sell well. We would instance, as a good model of an Index, that prepared by Mr. Gibson for Mr. O'Brien's Division Court Manual.

We publish, in another place, the very able and elaborate judgment of Mr. Justice Taschereau, in the case of *Angers v. The Queen Insurance Co.*, on the powers of the Local Legislature as to direct and indirect taxation. The judgment was given by Mr. Taschereau, whilst sitting in the Court of Queen's Bench for Quebec; but, although the case has gone to the Privy Council, this exhaustive exposition of the law on the subject discussed (as remarked by the Master of the Rolls in *L. R.* 3 Appeal Cases) has not yet been reported. Mr. James Bethune has kindly called our attention to it and sent us a copy of the judgment, which we gladly publish, as it has frequently been asked for by the judges. It was originally written in French, and has been translated by Mr. Duval, Reporter to the Supreme Court.

The opinion is freely expressed by Chancery men that another Judge is required on the Equity Bench. It is no exaggeration to say that the work done by each Equity Judge is about double that which devolves upon each of the

EDITORIAL NOTES—PUNCTUATION IN ITS LEGAL ASPECT.

members of the Common Law Courts. The special work in Chancery is undoubtedly increasing, and the cases are much more ponderous and complicated than those which arise at Law. The result of the pressure of business is such that the sittings at Toronto are now being held during weather in which it is a positive "cruelty to animals" to work. While we hear of applications being made in the Provinces for an increase to the judiciary, there is none in which an addition is more required in the interests of the public than in the Court of Chancery for Ontario.

Many times have suitors blessed the Judge who invented the "Peremptory List." The theory of this list is that the Judge enters on it, for trial each day, so many cases as, in his judgment, amounts to a fair day's work, and which, if tried, would be a fair day's work. By this means counsel and suitors and witnesses know what is expected by the Court, and are ready accordingly. But the strange spectacle has lately been seen of a Judge so voracious of work as to inscribe twenty cases on the list as the smallest per diem allowance which will satisfy his appetite! Of course it is almost impossible to have all the people concerned in twenty cases waiting each day. Better abolish the list altogether than make a mockery of it.

The same learned Judge has, during the Toronto Assizes, commenced his work at half-past eight in the morning. This is also charming in theory during the hot weather. The great orators and the little speechifiers of ancient Greece charmed or wearied their Athenian audiences as the sun began to light up the Parthenon. The learned and energetic Judge alluded to feels, doubtless, that he is not only following, but setting a good

example. It is one of the dispensations of Providence that counsel, as soon as they go on the Bench, forget what manner of men they were. It does not occur, for example, to the Judge, who breakfasts quietly at an hotel and then saunters to the Court House, free from care of household or client, that such cares were, in previous years, also his unhappy portion. It is, of course, very jolly for lawyers to "get up the night before" to attend to these minor matters before Court, and it is good for them to try and look pleasant when their houses, their clients and their offices have been neglected, but some of them are stupid enough to grumble about it, and say they won't stand it, &c. This, however, is all nonsense, they will be Judges themselves some day, and then they will take it out of some one else, and so it will be all right on an average.

PUNCTUATION IN ITS LEGAL ASPECT.

The "Treatise on Punctuation" by a thorough-bred pointer which Tom Hood projected in his imagination would, if an actuality, have small claims upon the attention of the lawyer. He, it is generally believed, is superior to these cabalistic contrivances in the way of stops in order to shorten and elucidate his sentences. "*Jurisconsultus non curat de verbis*" was the pithy maxim of the sage Accursius, and it has been adhered to with great fidelity by the race of lawyers from his day to the present and *a fortiori* by conveyancers. Joshua Williams, in his first book for the use of students in conveyancing, says not without commendable pride "the reader will be struck with the stiff and formal style which characterizes legal instruments, but the formality to be found in every properly drawn deed has this advantage that the

PUNCTUATION IN ITS LEGAL ASPECT.

reader knows at once where to find any portion of the contents. Throughout the whole not a single stop is to be found, and the sentences are so framed as to be independent of their aid, for no one would wish the title to his estates to depend on the insertion of a comma or a semi colon. The absence of stops renders it next to impossible, materially to alter the meaning of a deed without the forgery being discovered." Lord St. Leonards said (when Lord Chancellor of Ireland) "In wills and deeds you do not ordinarily find any stops; but the Court reads them as if they were properly punctuated": *Heron v. Stokes*, 2 Dr. & War. 98.

There is, however, one class of instruments in particular, those namely which are testamentary in character, where marks of punctuation such as the introduction of capital letters or other marks indicating where a sentence or clause was intended to begin, parentheses and the ordinary stops may be taken into consideration by an inspection of the original document: see the observations of Vice-Chancellor Wood in *Oppenheim v. Henry* cited in the note to *Walker v. Tipping*, 9 Hare, p. 102. This is permissible even in wills of pure personalty where the probate is conclusive as to what the words of the will are (*Langston v. Langston*, 2 Cl. & Fin. 240, and *Havergal v. Harrison*, 7 Beav. 49); but the appearance of the original may, nevertheless, affect the sense and assist the construction in doubtful cases.

It is true that Sir William Grant declined to resort to this means of aiding the construction in *Sanford v. Raikes*, 1 Mer. 651, where he said, "the decision cannot depend on the grammatical skill of the writer of the will in the position of the characters expressive of a parenthesis. It is from the words and from the context, not from the punctuation

that the sense must be collected." But other judges in later cases have not disregarded this means of ascertaining the testator's meaning, and have been influenced in their judgment by what appeared in the way of punctuation and structural arrangement on the face of the original document: see by Knight Bruce, V. C. in *Compton v. Bloxham*, 2 Coll. 210; and *Morrall v. Sutton*, 1 Phil. 538 by Parke, B.; and by Wood, V. C., in *Milsome v. Long*, 3 Jur. N. S., 1073. In *Gouver v. Towers*, 26 Beav. 81 it is noticed that the word "And" began with a capital letter in the probate. In *Childs v. Elsworth*, 2 De G. M. & G. 679, Lord Cranworth said, "We have caused the original will to be examined, and it appears that the whole gift in question is written continuously as one sentence and is closed with a full stop." In *Gaunillett v. Carter*, 17 Beav. 589, the Master of Rolls placed a good deal of reliance upon the position of marks of punctuation, observing that he did not see how he could reject the commas, and that it seemed to him that the stops were inserted by the testator and were intentional. In an American case, *Arcularius v. Sweet*, 25 Barb. S. C. 405, the judge said, "Punctuation may, perhaps, be resorted to where no other means can be found of solving an ambiguity; but not in cases where no real ambiguity exists except what punctuation itself creates." It was contended in that case that a semi-colon made all the difference in the meaning, but the Judge said, "A single dot over a comma so easily inserted by mistake or design and so difficult, if not impossible in most instances, of proof or disproof, can never be allowed to overturn the natural import of the written words." And in *Manning v. Purcell*, 24 L. J. Ch. 523 (note), Lord Justice Knight Bruce said that even in wills of personalty Judges in Chancery were not bound to confine

PUNCTUATION IN ITS LEGAL ASPECT—LAW SOCIETY, EASTER TERM.

their attention to the probate, but might as he had known Lord Eldon repeatedly do, look at the original will in the testator's handwriting with a view to see whether anything there appearing, as for instance, the mode in which it was written, how "dashed and stopped," could guide them in the true construction to be put upon it. (S. P. but not so fully given in 7 De G. M. & G. 55.)

Punctuation is not allowed to throw light on the printed statutes in England as pointed out by Romilly, M.₁R., in *Bor-row v. Wadkin*, 24 Beav. 330, where the question was whether a comma was to be placed at the top of the word "aliens" so as to mark a genitive, or between it and the next word; because in the Rolls of Parliament the words are never punctuated, and accordingly, said the Judge, very little is to be learned from the original statute, and he had to gather the meaning from the context. In the case already cited from 25 Barb., Roosevelt, J. refers to an extraordinary case where the powers of the Federal Government depended on a comma and parties divided on a semi-colon. One side read in the Constitution that Congress should have power "to lay taxes to pay (i. e. in order to pay) the debts and provide for the common defence and general welfare; the other that the powers given were independent, 'to lay taxes,' 'to provide for the general welfare,' &c. The semi-colon interpretation was finally with-thrown and the written words and natural sense prevailed over "stops."

LAW SOCIETY.

EASTER TERM, 43RD VICTORIA.

The following is the resumé of the proceedings of the Benchers during this Term, published by order of Convocation:—

MONDAY, May 17th, 1880.

The Minutes of last meeting were read and approved.

The report of the Examiners on the examinations for call to the Bar was received, read, and approved.

The report of the Secretary as to the papers of the candidates was read.

Messrs. Delahay, Stewart, Gundry, Shannon, Deacon, Brophy, Carey, Walkem, and Muir were called to the Bar.

The report of the Examiners on the examinations for admission as Attorneys was received, read, and approved.

The report of the Secretary as to the papers and service of the candidates was read.

Ordered, that Messrs. Deacon, Delahay, Stewart, Morphy, Radcliffe, Waddell, Kerr, Hatton, Orr, and Case do receive their certificates of Fitness.

Ordered, that the cases of Messrs. Carey, Proudfoot, Hewson, Curran, Boulton, Brophy, McMahon, Munro, and Eakins be referred to the Committee on Legal Education for report.

The report of the Examiners on the Intermediate Examinations was received and read.

Ordered, that the examinations of Messrs. Riddell, Cassels, Gausby, McCaul, McAdams, Kean, Dickinson, McKenzie, McDonald, Leeming, Robertson, Mabee, Land, Delaney, Carroll, McLean, Wilson, Mills, Cameron, Foy, Davis, Beardmore, Drought, Haight, Cameron, E. R. Taylor, McLean, Cavell, and Williams be allowed them as their first intermediate examination.

Ordered, that the examinations of Messrs. Campbell, Jones, Johnston, Hastings, Nelson, McBeth, Marsh, Macdonald, W. A. Bitzer Hough, Matheson, Ritchie, Mowat, Brouse, Scholesfield, Macdonald, George Henderson, Luscombe, Graydon, Maason, Sanderson, Justin Dexter, Sherry, McMeans, Armstrong, Cahill, Lane, Morphy, H. B. McLaurin, and Spotton, be allowed them at their second intermediate examinations.

The report of the Committee on Discipline on the cases of Messrs. Hastings, Porter and Hooper was received, read and adopted.

The petition of J. Boulton in reference to his examination for call was refused.

The petition of J. J. Stephens in refer-

LAW SOCIETY, EASTER TERM.

ence to his annual certificates was referred to Finance Committee, with power to act.

The report of the Committee of Legal Education on the Primary Examinations was received and read.

Ordered, that the following gentlemen be admitted as students-at-law and articled clerks :

GRADUATES.

Robert Peel Echlin, W. H. W. Daley.

MATRICULANTS.

Alexander B. Shaw, Leonard H. Patten.

JUNIORS.

Douglas Alexander, Paul Kingston, Theophilus Bennett, E. W. J. Owens, A. J. Flint, and Donald Macdonald.

ARTICLED CLERK.

W. D. Scott.

The report of the Committee on Legal Education on the petitions of Ghent Davis, Leonard Harstone, Frederick Rogers, A. W. Ford, and A. W. Orr, was received, read, and adopted.

Mr. Becher moved that the Discipline Committee be requested to consider and report upon the powers of Convocation to deal with students-at-law and articled clerks who may appear to have been guilty of improper conduct.—Carried.

A letter from the Sheriff of Wentworth was laid before Convocation.

Ordered, that it be filed and laid before Convocation in the event of the person referred to in it applying for admission to the Society.

Messrs. Johnston, McLean, Scott and Lemon were called to the Bar.

Mr. Britton moved that the chairmen of the several Standing Committees, and the Treasurer be appointed a select committee to strike the standing committees for the ensuing year, and that they do submit the names proposed for such committees on Saturday next.—Carried.

•TUESDAY, May 18th, 1880.

The minutes of last meeting were read and approved.

Messrs. Grant, Robinson and McLaren were called to the Bar.

The Committee on Legal Education report on the petition of Mr. Loughheed, re-

commending that he be allowed his examination in the Law School as his second Intermediate Examination Report.—adopted.

The same Committee recommend that no action be taken on the petition of Francis Jones.—Report adopted.

The same Committee recommend that the intermediate examination passed by James Henry, as a Student-at-law, be allowed him as an articled clerk.—Adopted.

The same Committee recommend that Mr. Carey's certificate of fitness be issued to him on his filing the certificate and affidavit proving his service with Mr. Blackstock.—Report adopted.

The same Committee recommended that in the case of Mr. C. E. Hewson, the rule as to service under articles being effectual only from the date of the Primary Examination, be dispensed with, and that he receive his certificate of fitness.—Report adopted.

The same Committee recommended that certificates of fitness be issued to Messrs. Curran and Boulton.—Report adopted.

The same Committee recommended that in the case of Mr. Jas. W. Brophy, the filing of his articles be allowed as sufficient, and that the rule as to service being effectual only from the date of the primary be dispensed with, and that he receive his certificate of fitness.—Report adopted.

The same Committee recommended that Mr. Eakins receive his certificate of fitness, on his filing a proper certificate from Mr. Mulock.—Report adopted.

Ordered, that certificates of fitness issue to Messrs. Carey, Hewson, Curran, Boulton, Brophy and Eakins, in accordance with the report of the Legal Education Committee.

The report of the Finance Committee, recommending the erection of an Examination Hall, and the introduction of additional telephone service, was received and read, and ordered to be considered at the next meeting of Convocation.

The matter of J. Malcolm Munro was referred to the Legal Education Committee, with a request that the Committee furnish Mr. Robertson, of Newmarket, with a copy of Mr. Munro's declaration, in order that he may reply to the same if he so desire.

LAW SOCIETY, EASTER TERM.

The Legal Education Committee reported in the case of Mr. Proudfoot, recommending that the rule of the Society as to the Primary Examination be dispensed with as in Ede's case, and that he receive his certificate of fitness.—Report adopted.

Ordered, that Mr. Proudfoot receive his certificate of fitness.

SATURDAY, May 22nd.

The Minutes of last meeting were read and approved.

The report of the Special Committee to strike Standing Committees was received, read and adopted, as follows:—

EASTER TERM, 1880.

To the Benchers of the Law Society in Convocation:—

The Select Committee to strike Standing Committees recommend that the following be the names of the gentlemen in the respective Standing Committees of the Society up to Easter Term, 1881.

FINANCE.

James Bethune, John Crickmore, E. Martin, James A. Miller, D. B. Read, Stephen Richards, L. W. Smith.

LIBRARY.

James Bethune, Hector Cameron, Thos. Ferguson, Æmilius Irving, Francis Mackelcan, Dr. McMichael, Stephen Richards.

REPORTERS.]

James Bethune, Byron M. Britton, Hector Cameron, Francis Mackelcan, James MacLennan, Dalton McCarthy, Edward Martin.

LEGAL EDUCATION.

Thos. M. Benson, John Crickmore, Thos. Ferguson, Alex. Leith, John Hoskin, Thos. Robertson, L. W. Smith.

DISCIPLINE.

Thos. M. Benson, John Hoskin, James MacLennan, Dr. McMichael, Stephen Richards, Thomas Robertson, Arthur S. Hardy.

JOURNALS OF CONVOCATION.

Byron M. Britton, Hector Cameron, Thomas Ferguson, John Hoskin, Æmilius Irving, J. K. Kerr, James MacLennan.

COUNTY LIBRARIES.

Thos. M. Benson, Hector Cameron, John

Hoskin, J. K. Kerr, W. R. Meredith, J. A. Miller, Thomas Robertson.

JOHN CRICKMORE,
Chairman.

Messrs. Fitzgerald and Andrews were called to the Bar.

The Report of the Legal Education Committee recommending that Messrs. C. H. Ivey, Charles R. Irvine, and R. W. Armstrong, be entered on the books of the Society as graduates, was received and read.

Ordered, That C. H. Ivey, Charles R. Irvine and R. W. Armstrong, graduates of universities, be entered on the books as Students-at-law.

The Report of the same Committee recommending that Mr. Lefroy be excused his second intermediate examination under the special circumstances of his case, was received, read and adopted.

Moved by Mr. Read, seconded by Mr. Mackelcan, That Mr. Blake be re-elected Treasurer for the ensuing year.—Carried.

The Report of the Legal Education Committee on the case of Mr. Munro was received, and read, recommending that he be granted his certificate of fitness.

Report adopted.

Ordered, That Mr. Munro receive his certificate of fitness.

A letter from Mr. J. C. Hamilton, referring to the passage way to the Master's offices was read.

Ordered, That the Secretary write to the Attorney-General, requesting him to direct that the proposed arrangement be carried out.

The report of Mr. Robinson, the Editor of the Reports, was received, read and referred to the Reporting Committee.

The Report of the Finance Committee, presented at last meeting and ordered to be considered to-day, was brought up.

1st. The clause as to Examination Hall was adopted, and the Committee directed to procure a plan and estimate of the cost.

2nd. The clause as to increased telephone service, was adopted.

Mr. MacLennan for the Chairman of the Library Committee, moved, that the Librarian and his Assistant be granted leave of absence, the Librarian for two weeks and

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his assistant for three weeks during the long vacation.—Carried.

Mr. Read moved, That Mr. Crickmore, the Chairman of the Legal Education Committee, be appointed representative of the Law Society in the Senate of the University of Toronto until the end of Easter Term, 1881.—Carried.

Mr. Crickmore gave notice that, at the next meeting of Convocation, he would move, that the option to take German for the Primary Examination contained in the former curriculum be continued till after next term.

Mr. Blake gave notice that, at next meeting of Convocation, he would move for the appointment of a committee to consider and report a plan for the establishment of scholarships in connection with the Intermediate Examinations.

Mr. Read gave notice that, at the next meeting of Convocation, he would move that the Report of the Select Committee in favour of the abolition of the Law School, adopted by Convocation, be printed in the Journals.

FRIDAY, June 4th.

The Minutes of last meeting were read and approved.

The letter of Mr. Prescott, asking for information as to what an English attorney would be required to do in order to be admitted as an attorney, and called to the Bar in Ontario, was read.

Ordered, That Mr. Prescott be referred to the Rules of the Society, and informed that it is contrary to the practice of Convocation to consider cases before they come before it in regular course.

The Report of the Committee on Reporting as to the printing of the Reports of the various Courts, and recommending that the edition of the Reports be increased to 1,350 copies, and that the number of copies of the Supreme Court Reports purchased by the Society for distribution, be increased to 1,350, and further recommending that no change be made at present in the existing arrangements for the publication of the Reports was adopted.

Mr. Read moved that the report of the Select Committee in favour of the abolition of the Law School be printed in the Journals.—Carried.

Mr. Crickmore moved that the option to take German for the Primary Examination contained in the curriculum be continued up to and inclusive of next Michaelmas Term.—Carried.

Mr. Blake moved that a Select Committee, composed of Messrs. Crickmore, Robertson, Leith, Richards, Mackelcan, Martin, MacLennan, McCarthy, and the Treasurer, be appointed to consider and report a plan for establishing Scholarships in connection with the Intermediate Examinations, the Committee to have power to consider the expediency of abolishing the Special Scholarships.—Carried.

Mr. Robertson gave notice that he would, at the next meeting of Convocation, move that the rules for the Call of Barristers in special cases, under 39 Vic. cap. 31, sec. 1, be amended

1st. By striking out sub-section 1 of section 4 of rule 2, and that sub-section 2 of section 1 of same rule be amended so as to cover and include all attorneys, solicitors or writers, of at least five years' standing.

2nd. By amending rule 3, so as to make the fees payable by such candidates for Call to the Bar, in addition to the ordinary fees payable for admission and for Call, three hundred dollars (\$300).

3rd. That rule number 2 for the admission of attorneys and solicitors in special cases, under 39 Vic. cap. 31, sec. 2, be so amended as to make it competent for any Barrister to be admitted as an attorney and solicitor without any further examination as to fitness, &c.

Mr. Mackelcan moves that Mr. MacLennan, Mr. McCarthy, Mr. Bethune, and the mover, be appointed a Committee to confer with the Attorney-General and the Judges upon the subject of short-hand reporting, and the subject of the cost of short-hand writers' notes, and further to urge upon the Attorney-General that the parties should not be required to pay for the copies of evidence furnished to the Judges in Common Law cases, but only for such copies as they may order for their own use.—Carried.

Convocation adjourned.

CHARGE OF JUDGE GOWAN.

The following charge of His Honour Judge Gowan to the Grand Jury, at the late June Sessions of the County of Simcoe, will be read with interest by many; especially so as it discusses the recent legislation of the House of Assembly on several subjects of a legal nature.

His Honour, after referring to the state of the Calendar, said:—

DRUNKENNESS AND CRIME.

It is sad to know, taking a long retrospect of thirty-eight years of judicial life, that nearly two-thirds of the criminal cases which came before me were traceable to the use of intoxicating drinks, provided under the shadow of the law, and I every day perceive more clearly what I have often before said, in one form or another—the intimate connection between drunkenness and crime; in fact, that habitual drunkenness almost invariably leads to the commission of crime.

I think that the efforts of earnest men in the cause of temperance have done something to diminish the evil incident to, and it would seem inseparable from, the traffic in intoxicating drinks. There is certainly some change in public sentiment; but sustained effort is as needful as ever, till such a healthy public feeling on the subject is formed as will justify more stringent enactments for the personal restraint and penal control of the drunkard and for securing effective responsibility and punishment in the case of those who tempt their fellow-creatures to crime, or for abolishing altogether the traffic in intoxicating drinks.

RECENT LEGISLATION.

I avail myself of this occasion to direct attention to some of the statutes passed at the last session of the Provincial Legislature.

There are several Acts relating to municipal law, all of which will require to be carefully examined by those to whom the administration of the municipal law is confided, for the alterations and amendments made in the old law are numerous and important, though, for the most part, in matters of detail.

TAX EXEMPTION.

In respect to the assessment law, I may observe that a very decided inroad will be found to have been made upon exemptions from municipal assessment, affirming, it would seem, that the principle upon which the privilege is based is unsound and inapplicable to our condition. The action

of the Legislature gives some hope that the day is not far distant when the present *forced benevolence* in favour of certain officials, religious bodies, and church officers, will be abolished altogether.

INSOLVENT LEGISLATION.

In consequence of the repeal of the Insolvent Act, it became necessary to devise some means of securing to creditors, with as little delay and cost as possible, a fair division of an insolvent debtor's property. A very carefully prepared Act, having this object in view was also placed on the Statute Book, and I think it will serve to a great extent the objects aimed at. But the subject is a difficult one to deal with, the Province having only limited powers of legislation in respect to the matter.

LANDLORD AND TENANT.

Lodgers and boarders were often subjected to great loss and injustice by the exercise of the landlord's power to levy a distress on their goods and chattels for arrears of rent due to the superior landlord by his immediate lessees or tenant. This has been remedied by another Act of last session, and by a simple process, provided for in the Act, the lodger or boarder will now, on just terms, be able to save his property from sale for arrears of rent.

THE DIVISION COURT EXTENSION.

Every change connected with the Division Court is of interest to the general public, seeing that for the collection of debts and otherwise, some two hundred persons resort to them for every two persons who use the Superior Courts; and although the claims of the former may be small in amount, they are relatively as important as the large claims of the more wealthy suitors in the Superior Courts. One of the Acts of last session effects very important alterations in the law relating to the Division Courts, and I wish to direct attention to some of its provisions. It is now thirty-nine years since Division Courts were established in this Province, and they have grown steadily in public favour, if one may judge from the largely increased jurisdiction conferred upon them. Those most familiar with the working of these courts believed that the highest limit for safe and efficient working had been reached; but the Legislature, in the face of strong and unbiased testimony to that effect have been brought to think otherwise, and doubled the jurisdiction in respect to certain money demands, and increased it by fifty per cent. in cases of *tort*. I hope it may not be found that this will impair the value and usefulness of the courts to those who will chiefly use them, promoting

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only the interests of the few at the expense of the many. I have myself great misgivings as to the general result of the large increase working benefit. I am bound to say, however, that the measure has been so framed as to obviate as far as seemed practicable, the drawbacks of a mixed jurisdiction in courts of summary procedure.

But there is a view of the subject very important in relation to credit. A very large number of the transactions with rural dealers do not exceed the highest limit of the new jurisdiction, and there may be some danger in submitting certain written contracts to adjudication in tribunals where "good conscience" is admitted as a rule for decision of legal rights; at all events there will be a certain amount of uncertainty, and one can understand that purely "commercial paper," for amounts under the new jurisdiction may lose something of its value in the eyes of commercial men. It may not be an evil if thereby the credit system is reduced; but on the other hand there may be the temptation to run a liability beyond \$200, merely for the purpose of bringing the promise within the range of the Superior Courts, where unbending strictness in legal decisions prevails, and the power of juries is restricted.

THE APPOINTMENTS OF DIVISION COURT OFFICERS.

The duty of appointing the officers of the Division Courts was, from their institution, committed to the Judges, who were in a position to personally examine candidates for office, as to their educational fitness, and to know something as to their moral character. During the thirty-six years in which I performed the duty, ninety-four officers were appointed as clerks and bailiffs, some of them on promotion from one office to another, and I can say that with very few exceptions, better men or more faithful and efficient officers in the position could not be found. In all these years on four occasions only had I to exercise the power of removing clerks. A very large number have died in the service, some few resigned, and of my first appointments, in 1843, only three persons are now living.

The Act of last session changes the mode of appointment. The Lieut.-Governor now appoints clerks and bailiffs. The duty of appointing and selecting fit persons, with the care and promptitude necessary will be found no easy task under this centralization of the appointing power, for the Division Court officers are a numerous body, some-630, and scattered all over the Province.

TENURE OF OFFICE.

Some uneasiness, I learn, is felt amongst

officers, in respect to the security of their position, now that the appointment is "political." I believe there is no ground for any uneasiness—that an arbitrary exercise of the power of removal by Government is just as improbable now as under the old law. In "a paper" addressed to the officers of my Judicial District, published many years ago, when the judge had the power of appointing and removing clerks and bailiffs, I said:—

"The letter of the statute makes the tenure of the office for both clerk and bailiff during the 'pleasure' of the judge; but an office connected with the administration of justice ought at least practically to be upon a more certain tenure, and while willing and able to perform the duties required of him, faithfully, discreetly, and in the mode prescribed, every officer should be able to feel assured that his position was secure. These, my early formed and known sentiments, need no repetition to convince officers in this county that the exercise of my 'pleasure' will not be bottomed on caprice. But I hold the power of removal as a trust, and may not decline to exercise it when inability or misbehaviour in office is made to appear to my satisfaction."

This, the only just principle, will, I am persuaded, guide Governmental action, whatever irregular influences may be operative; indeed, the Government have beforehand recognised it *on the face of the measure* in a very prominent way, giving by express provision, in effect, a better tenure than before, "misconduct or incompetency" being the grounds to warrant a dismissal from office.

FURTHER LEADING PROVISIONS OF THE ACT.

I cannot now enter into the full particulars of the Act, but I may refer to some more of the leading provisions. An appeal is given in cases for amounts over \$100—fees to professional agents may be allowed in such cases, and provision is made for the creation of a jury fund by a small fee levied on suitors. This last will be felt as some hardship in the Courts where jurors are not desired by suitors, but I presume it was thought to be the best plan that could be devised for the compensation of jurors.

SUBSTITUTIONAL SERVICE.

There is also another provision making substitutional service sufficient where a debtor evades personal service or absconds. These are good provisions, and are calculated to save unnecessary costs to suitors.

A PROVISION AS TO FEES.

There will always be a difficulty in the proper adjustment of remuneration by fees; in some Courts officers receiving more than

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a fair compensation for the duty, in others not enough. This the Government have, I think, wisely met in the new law by requiring the amount received for fees, in excess of a fair remuneration, to be paid into the Provincial Treasury. But the requirement involves much work in keeping accounts and in returns to Government by all, even more work than was necessary before stamps were done away with. Clerks are allowed nothing for this extra work—not even the small quarterly fee allowed by Government for similar returns as to stamps. This certainly is not reasonable, and may well be complained of, especially in view of the fact that books, forms and stationery are not supplied to Clerks by Government; the cost of them coming out of the officer's own pocket, when not supplied by the County.

JUDGMENT DEBTORS.

A good deal has been said against what are called the "Judgment Summons clauses" of the Division Court Act, I must think in ignorance of their scope and intention; for rightly used and administered they are very valuable provisions. They certainly give no sanction to "imprisonment for debt." The object of the law, as I put it in a public address to the Courts in 1861, when the Statute came into force, is this:—The powers given are for the discovery of property withheld or concealed, the enforcement of such satisfaction as the debtor is able to give, and for the punishment of fraud. The debtor willing to give up his property to his creditors, ready to submit his affairs for inspection, and who has acted honestly in a transaction, although he may not be able to meet his engagements, has nothing to fear from the operation of this law. It is the party who has been *guilty of fraud* in contracting the debt, or who will not apply means in his power towards liquidating it, or who secretes or covers his effects from his creditors, that the law looks upon as a criminal, and who may, but only on the order of a Judge, be imprisoned as punishment for his misconduct.

I have had a long experience in the working of this law, and I would be sorry in the interest of justice and fair dealing to see it removed from the statute book. Judging from my own experience, I would say that there is no foundation whatever for the charge that debtors are harshly dealt with under these clauses, for in this large county *only twenty-three commitments have occurred under this Act for the last seven years*, and not an average of four commitments per year since 1861, in this, the largest and, with the exception of York, the most populous jurisdiction in the Province. It may

be that creditors sometimes hastily resorted to the remedy by Judgment Summons, causing unnecessary trouble and irritation to poor debtors. This was an evil, and the new Act very properly deals with it, placing certain wise restrictions on the indiscriminate use of the process by creditors, thus preventing abuses of the kind.

DIVISION COURT INSPECTION.

This Act also creates a new office in connection with the Division Courts—that of Inspector, with a salary not exceeding \$1,400 yearly, and having certain specified duties assigned to him. Under our Division Court system there are in the Province some three hundred Clerks acting separately and independently in the discharge of numerous and complicated duties of detail; it is not easy, therefore, to secure an exact compliance with all the duties prescribed by statute and rules without a general inspection of some kind, and my impression is that an intelligent and discreet inspector of some kind may be of much use in this way. Time, however, will show whether the office will answer the ends for which it was created—will test the experiment, whether a success or otherwise.

OTHER CHANGES.

An appeal from the decision of Magistrates under the Master and Servants' Act was formerly to the Sessions. By this Act it will now be to the Division Court. The County Judge is the presiding officer in both Courts, but the change will, in my opinion, effect a great saving to parties both in time and expense. This Act also contains other useful provisions for the administration of the law in the Division Courts.

THE GRAND JURY QUESTION.

The question of the abolition of the Grand Jury has, it is satisfactory to know, attracted considerable attention, and is now being discussed in this and the other Provinces of the Dominion; and I notice that a gentleman long familiar with the administration of the criminal law has laid before Parliament a measure on the subject. It is well that the matter should be fully considered before legislation takes place, especially as some difference of opinion prevails. I retain the opinion I have so often expressed, that Grand Juries may, with safety and with great benefit to the administration of criminal justice, be abolished, and that all that is necessary to retain of their functions may be better and more economically performed by *responsible* agents of the Crown. But I do not purpose enlarging at this time upon what has been already said; indeed, able writers in the public press have taken the matter up and

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little has been left to say in the way of reply to those who wish things as they are, that has not been already well said in the public press.

The matter is now before the public. I have obtained the object I aimed at in addressing Grand Juries, which was not to draw out an expression of opinion from the particular body addressed. I merely availed myself of these occasions, hoping to direct public attention to what I believed to be a great defect in the criminal law, which a long experience has convinced me required reform—a reform that could be economically, easily and safely accomplished.

SELECTIONS.

PRESUMPTIONS IN CRIMINAL CASES.

PRESUMPTION OF INTENT.

(Continued from p. 148.)

Now, in no one of the four cases above given does the intent square with the execution, yet of what are called malicious killings these categories constitute a large proportion. Taking them in connection with negligence, we may say, therefore, that in only a small proportion of offences does the offender execute that which he really intends. It is not generally true, therefore, but generally false, that an act is intended by its perpetrator.

Does this again, land us in scepticism? Because we have to reject the proposition that all offences are intended, are we to sweep out of existence the entire category of malicious crimes, and say that there is no way in which a malicious crime can be proved? So far from this being the case, the rejection of the false proposition here criticised leads us to the only logical and just way in which malice can be established. It undoubtedly imposes higher intellectual labour on bench and bar, and requires from them higher intellectual gifts than did the old system by which malice was at the outset assumed. It undoubtedly is an easy thing to say, "he did it, therefore he did it maliciously and intentionally." But it is an untruth in many cases, and in all cases is a *petitio principii*; sometimes leading to bad pleading, causing men to be indicted for the wrong crime instead of the crime really committed; sometimes oppressing innocent men, by throw-

ing the burden of proof on them, when the burden is really on the other side; sometimes producing acquittals because the jury feel that the assumption is an outrage on common sense, as when they are told that shooting a tame fowl, with intent to steal, when the ball glances and strikes B, whom the assailant did not see and had no reason to imagine to be in the neighbourhood, is shooting at B, "with intent the said B, feloniously, wilfully, and of malice aforethought, to kill and murder." The only logical and right way is to indict a man for what he really does. If he is trying to steal a tame fowl, then he is indictable for an attempt at larceny. If he kills a man negligently when trying to steal the fowl, then he is indictable for negligent homicide. And when he is indictable for an intentional and malicious act, then the conclusion is to be reached by a canvassing of all the circumstances of the case. No two cases are precisely alike. There is no rule which fits absolutely even two cases. We must put all the facts together, and examine whether from them by free logic, we can infer malice. The process is not deductive, but inductive. It is determinable not *a priori* by any postulate of positive jurisprudence, but, after the evidence is in, by inference from all the circumstances of the case. The question, therefore, is one of fact for the jury, to be adjusted by the law of sound reasoning, not by technical jurisprudence to be absolutely pronounced by the court. Yet, while for the jury, and, in the sense above stated, a question of fact, it is also a question of law in its most comprehensive sense, of the law of inductive proof. And to this law, as pouring its light upon all the circumstances of the case, should the attention of counsel be turned in their argument, and of the courts in their charge.

FALSIFICATION OF EVIDENCE.

In the days of Sir Elijah Impey, an English merchant in India was sued on a promissory note. "It is forged," said he to his attorney. "Never mind," was the reply, "We will make it all right." The client gave the attorney a list of witnesses who would prove the forgery, and went into court expecting to hear them called. To his surprise, his counsel, after

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the plaintiff's case was closed, pulled out a release. "But the release"—so the client afterwards objected to his attorney—"was never given to me; I never heard of it before." "That is true," was the reply, "but the shortest way was to meet the plaintiff on his own ground, so we forged the release." It is unfortunate that in our criminal courts there is a class of lawyers who are unscrupulous enough to seize upon any defence that is available, no matter how false they may know it to be. That there are witnesses also ready to swear to any defence, when they do not run the risk of prosecution for perjury, is illustrated by the hangers-on who can be counted upon to offer and to swear to straw bail. It would be unjust, therefore, to impute to the client that which may be the entire work of the counsel. We have no right to infer guilt, even if false testimony is brought into court knowingly by counsel.

But we must remember that there are many cases in which such testimony may come in without the complicity of either client or counsel. We have already noticed instances in which perjury has been deemed by the witness committing it, a point of honour. Lord Cockburn, in his *Reminiscences*, notices several trials in which high-minded Scotch lords, who would scorn an untruth themselves, looked upon it as a matter of course that their retainers should come into court to swear to whatever might help their chief. But in many cases where false testimony is rendered, even this extent of connivance cannot be imputed. A man is to be tried on a capital crime. It is natural to suppose that among those whose being is wrapt up in his, there may be someone ready to sacrifice himself, if it need be, for the rescue; someone like the Scotch servant, who would "rather trust his soul to God than his master to the Whigs." Yet this may be without any complicity on the part of the person on trial.

It should be remembered, also, that speculations, implicating others in a crime, may be thrown out conjecturally by persons themselves entirely innocent. For some days before the arrest, last summer, of Castine Cox, a series of letters appeared in the newspapers, suggesting

various persons as guilty, and one or two witnesses were ready to testify to facts, grossly exaggerated, if not fabricated, implicating the husband of the murdered woman. Where these speculations and fabrications the work of a person seeking in this way to divert attention from himself? So far from this being the case, the speculations were thrown out as guesses, something in the way in which answers to conundrums are published; and nothing would better illustrate the falsity of the presumption now before us, as a general rule, than the laughter with which the whole community would greet an attempt to charge the author of one of these communications on the ground that throwing the police on a false track is a presumption of guilt on the part of those by whom the luring device is concocted. So far as concerns those who concocted fabrications implicating the husband of the murdered woman, we have here simply illustrated the fact that there may be gratuitous and volunteer perjuries for a prosecution, as well as gratuitous and volunteer perjuries for a defence. Men may perjure themselves for notoriety, or for merely the witness fees and allowances attendant on a summons to testify in a contested prosecution.

But we still have to consider the case of a person charged with crime taking actual part in the concoction of a false defence. But does this necessarily imply guilt? Mr. Bentham, in arguing in the negative, appeals to a well-known story in the *Arabian Nights*. A little hunchback is accidentally choked by swallowing a fish bone. His host, finding him dead, places him at the door of a neighbouring chamber. The inhabitant of this chamber, opening the door and finding this unwelcome encumbrance deposited there, gives the body a kick, and is shocked, on returning to the spot a few minutes after, to find the hunchback dead. To ward off suspicion from himself, he takes up the body and places it in front of chamber number two, where a similar scene is shortly afterwards enacted. Quite a number of operations of this kind are gone through with, each successive occupant endeavouring to shift, in this way, suspicion from himself on his

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neighbour. It may be questioned whether most innocent men, whom suspicion lowers, would not do pretty much the same thing. A man of cool sagacity would undoubtedly say, "This thing implicates me. I will confront the difficulty at once. I will court investigation, exposing to the proper authorities all the facts." But most persons would say, "Here is an ugly thing, which will only expose me to trouble and misconception. I will get rid of it in the best way I can." And, in point of fact, there is no trial for crime in which the law does not invite, in the shape of admitting all relevant hypotheses inconsistent with the hypothesis of guilt, argument, if not evidence, of this very class. It may be probably false, for instance, that a man found murdered committed suicide. It may be probably false that A, B, or C committed the offence. But it is relevant to put in any facts from which it might be argued that the deceased's death was by suicide, or through the agency of A, B, or C. The preponderance of evidence may be against those hypotheses; but nevertheless, false as they may be, it is the duty of counsel to present them to the court, and unless they are disproved beyond reasonable doubt, an acquittal follows. Of course, to suborn perjury is in itself an indictable offence: but to put in evidence, facts in themselves true, or believed to be true, from which a relevant hypothesis, however erroneous, may be argued, is proper for those charged with the defence of a criminal case. And again, unless actually concerned in the concoction of false testimony, how can counsel know that any testimony is false? And how can counsel know that any hypothesis, the verification of which would solve the case, is untrue, though there be a preponderance of evidence against it?

Yet there are many cases in which the getting up of a false defence seriously prejudices, as it ought to prejudice, a man charged with crime. For a man with the gallows before him to snatch at any straw, is but natural. But when a fraudulent defence is proven, then it is natural to say, "this is all of a piece." Of this class is the Tichborne case, in which the manufacture of perjury to affect the

facture of false proofs of identity to affect those to whom the claimant presented himself on his re-appearance in England. In the same line falls the Webster case. There was no strong presumption of guilt to be urged against Dr. Webster from the mere facts that he wrote letters to the newspapers suggesting various theories to account for the disappearance of Dr. Parkman. But there was a deep shadow cast on him by the fact that those letters were in a disguised hand; were covertly forwarded; and, on other grounds, seemed part of a system with an assassination, which, if not deliberately and cautiously planned, was, at least, deliberately and cautiously covered up. In such cases there is an inference of guilt to be drawn from the fabrication of testimony. But it is an inference from the whole case. It does not flow from the assumption that fabrication of evidence by a defendant is always a presumption of guilt. This is not true. But the reasoning is, that in this particular case such fabrications are part of a consistent system of cumulative proof from which guilt may be inferred.

FLIGHT OR FRIGHT.

Closely allied to the last presumption is the presumption so frequently given in old books, that from flight guilt is to be inferred. It was a very convenient presumption in cases in which the ruling powers wanted to humiliate an adversary, to confiscate his goods, and to get him out of the way. Bills of attainder were threatened, if the game was high; what we would now call "lynch law," if the game was low; and as the party threatened knew he would not have justice done to him, he fled. Few things strike us as more remarkable, in the English civil wars, than the way in which men charged with crime escaped, or hid themselves, to wait for a time when they could take advantage of a turning tide in order to become themselves prosecutors. From flight in such cases, guilt could not be inferred, for innocent as well as guilty fled. Even as late as the days of Charles II., Lord Clarendon, rather than face an imprisonment, fled to France, because he was conscious that, however good might be his defence, he

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could not expect a fair trial. In our own times, and in our own country, we can readily imagine circumstances in which an innocent man, courageous as he might be, might wisely evade a prosecution until a temporary prejudice against him should be overcome. We have recently been told that juries in the federal courts, at least in the Southern States, sympathize in politics with the marshals by whom they are summoned; and that in the same jurisdiction, state juries share, by a coincidence equally remarkable, the politics of the sheriffs. If so, it would not be strange if even a man of strong nerves, but of politics hostile to the jury by which he is to be tried, should avoid by flight a storm which he may believe to be temporary. And if a man of strong nerves might naturally do this, why not a man with weak nerves? Could we argue that a negro suspected of crime is guilty because he hides himself in the woods from a pursuit which he feels will end in a summary execution after being condemned by a mob? Or, to take the converse, would we have regarded it an admission of guilt for a Southern leader of the secession school, when charged with larceny, for instance, with the prospect before him of trial by a jury exclusively of negroes, under a judge politically hostile, to have left the country until a system less hostile should be established? And may there not be many cases in which persons of cultivation may be so unstrung as to be unable to face a trial in which they fear they may not have an opportunity of being fairly heard? To say, therefore, that flight is always a presumption of guilt, is monstrous. Yet, at the same time, it is impossible to deny that, logically as well as juridically, flight by a defendant is always relevant evidence when offered by the prosecution; and that it is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong, as the case may be, a confession; and it comes in with other incidents, the *corpus delicti* being proved, from which guilt may be cumulatively inferred.

What has just been said applies equally to the inference derived from *fright*.

Fright, or tremor, or confusion, or distraction, when a party is arrested, may be imputable to a cause very different from that of consciousness of guilt of the particular charge on which the arrest is based. We have cases on record in which men, when engaged in illicit errands, of a different type, have been arrested on charges of attempted larceny or burglary; and in which their confusion and anxiety when caught were regarded as indicating complicity in the offence with which they were charged, though, in fact, these emotions sprang from annoyance or dismay at being detected in an offence of another class. It is related of a dissolute English statesman, then in political disgrace, that, being visited by a person evidently disguised, there was a suspicion among the police that this visitor was a foreign emissary, whom it was treason to harbour. A search warrant was issued, and the house was entered. Its master, when he faced the officers, was in evident confusion. He begged that at least his own chamber should not be searched, and he did this with a distressed earnestness which convinced them that in that chamber they would find the person of whom they were in search. Of course this made them more eager, and they forced their way into the room. A person was there in bed. "I will show you enough to prove to you that this is not the man you seek," said Lord Bolingbroke, for it was his house that was entered. He uncovered enough of the body to show that it was that of a woman, keeping the head concealed so that she might not be identified. His anxiety and confusion when his house was entered sprang from his desire to protect himself and his paramour from detection in a disgraceful intrigue, not from the fact that he was harbouring the person against whom the warrants were directed.

But even supposing there is no separate sore touched, as in the last case, there are many persons whose nervous structure is such that, with them, confusion, if not prostration, is the consequence of a sudden charge of guilt. A very eminent American clergyman and publicist, one of the purest men our country has ever produced, died this autumn, at Berlin,

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from paralysis, attributed, in a large measure, to the shock of a charge as untrue as it was scandalous. When the bill allowing defendants in criminal cases the aid of counsel was before the House of Lords, the young peer who had charge of it broke down in his opening speech. He recovered himself, however, and made his embarrassment a telling reason for the measure he was to advocate. "If I am confused in making *my* first speech," he said, "though this is a speech about another, what must it be with a man charged with crime, who knows that on what he says, and how he says it, his own life depends." Few, except the most hardened and desperate of men, can stand such a test without flinching. And, apart from this, we have to consider the horror often incident to the first hearing of the perpetration of a great crime. In a famous English case, Spencer Cowper, of a historical family, which has been represented with like eminence in literature, in law, and in politics, was charged with the murder of a young girl with whom he had been intimate, and whose affections he had, however innocently, won. Her drowned body was discovered near a sequestered place where he had, at her request, on the preceding evening, appointed an interview with her. Suicide, or homicide, was the question; and if homicide were established, the indications pointed to Cowper. Her body, still reeking with water, was brought to the house, and he was suddenly charged by her relatives, maddened with grief, with the fearful crime. He staggered with horror under the shock, and this was made one of the main points against him on the trial that followed. He was acquitted ultimately, though after a fierce struggle, as party feeling was enlisted in the trial, Cowper's relatives being leaders among the Whigs, and the Tories undertaking to assume that party influence was enlisted to secure his acquittal. But acquitted he was, and righteously; though it is said that afterwards, when on the bench, he dealt tenderly with men who, when on trial for their lives, were unmanned by the terrors of a trial.

Yet with all this, it is relevant to put in evidence, on the part of the prosecu-

tors, the tremor or confusion, or prostration of the defendant when charged with the crime. In Dr. Webster's case very striking testimony to this effect was brought out, testimony that was no unimportant thread in the web of inferences in which he was inextricably enclosed. Calm and cool as he had been down to the period of his arrest, under this arrest he broke down. His legs seemed to refuse their support. The colour forsook his face. His tongue became parched. It is easy to conceive of such a condition in an innocent person charged with crime. It is easy to conceive of a person paralyzed with horror on such a charge, as is said to have been the case with Marie Antoinette when accused of a great wrong committed on her own son. It is easy to conceive of reason tottering under such a shock, as was the case with King Lear, when overwhelmed with his daughters' taunts. Yet, at the same time, tremor is one of the consequences of a conscience suddenly aroused to a sense of guilt and of impending exposure. It may be a consequence of other things. A man who is shown a gallows, and to whom it is said, "this is probably for you," may naturally fall into a tremor. But the fact that tremor may be an incident of other things than of consciousness of guilt does not make it irrelevant on trial.—*Criminal Law Review*.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO.

FERGUSON v. VEITCH.

[May 22.]

*Seduction—Evidence of defendant's means—
New trial.*

Held, following *Hodsoll v. Taylor*, L. R. 9 Q.B. 79, that, in an action for seduction, evidence as to defendant's means is inadmissible; and that evidence of the kind having been received, defendant was not to be prejudiced in his application for a new trial, because his counsel had, after having done his best to exclude the evidence, ex-

Q. B.]

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[Q. B.]

amined defendant on the same subject, with a view to disproving the estimate placed on his means.

J. K. Kerr, Q.C., for plaintiff.

Treasor, contra.

SNARE V. SMITH, Assignee.

Sale of goods—Trove against assignee in insolvency—Absence of bill of sale—Change of possession.

In trover for goods, against an assignee in insolvency. *Held*, following *In re Barrett*, in appeal, not yet reported, that the assignee may object to the absence of a bill of sale, on an alleged sale by the insolvent, just as an execution creditor or subsequent purchaser for value may do.

It was alleged that the plaintiff, who was living with his mother, gave the horses in question to her for his board, but no price was fixed for them, and they were kept at her house and used by the plaintiff as before. *Held*, that there was no sufficient change of possession to dispense with a registered bill of sale, and that the sale was void as against the assignee in insolvency of the plaintiff.

McCarthy, Q.C., for plaintiff.

Beaty, Q.C., and A. Cassels, contra.

VACATION COURT.

Osler, J.] [June 8.

Public schools—Dissolution of union sections—By-laws—Sufficiency of petition for.

On an application to quash a by-law dissolving a school-union section, *Held*, that the Court will not go behind the assessment roll with a view to ascertaining whether the petition for the by-law has been signed by the required number of the assessed freeholders and householders of the school section.

J. K. Kerr, Q.C., for applicant.

McMichael, Q.C., contra.

Osler, J.] [June 15.

REGINA V. FRAWLES.

R. S. O. ch. 181, ss. 35, 39, 51, 73—Liquor License Act—Conviction for third offence under s. 35.

On a motion to quash a conviction, appealed to the County Court Judge in Chambers, an objection that the writ of *certiorari*

was improperly directed to, and return made by, the Clerk of the Peace instead of the County Judge, was overruled.

Held, also, that there is no jurisdiction to convict beyond a second offence against sec. 35 of the Liquor License Act (R. S. O. ch. 181), and a conviction for a third offence under that section was quashed.

Observations on the different cumulative penalties for offences under ss. 35, 39, 43, 51 and 73 of above Act.

Hodgins, Q.C., for the Crown.

Ogden, contra.

CHANCERY.

Proudfoot, V.C.] [June 10.

LOUGHEAD V. STUBBS.

Pleading—Demurrer—Husband and wife—Parties.

An inchoate dowress, who joins with her husband in an agreement for the sale of an estate, that the husband shall pay off a proportion of the incumbrance, and that he shall convey free from incumbrances, is a necessary party to a suit for specific performance of the agreement.

Blake, V. C.] [June 18.

SAYLES V. BROWN.

Altering document—Bona fides.

A mortgagee executed a statutory discharge which was incorrectly dated and his agent in good faith and in order to make the instrument conform to the intention of the mortgagee altered the date; which alteration was under the circumstances immaterial, and, as altered, the document stated correctly what was intended by the parties to it. Under these circumstances a bill impeaching the validity of such discharge was dismissed with costs.

Blake, V. C.] [June 18.

GALBRAITH V. DUNCOMBE.

Executors—Trustee—Setting aside money for special purpose—Principal and surety.

One of several executors appropriated and set apart certain moneys of his testator to answer the trusts of the will, which moneys were afterwards paid by him to the solicitor

of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian. *Held*, that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet under the circumstances the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced with costs; though as against the surety the bill was dismissed with costs.

Spragge, C.] [June 21.

JELLET V. ANDERSON.

Ferry, disturbance of.

The plaintiff was the lessee of a ferry from the Town of Belleville to Ameliasburgh, Ameliasburgh being a township running in a westerly direction opposite Belleville, to the head of the waters of the Bay of Quinte, a distance of ten or twelve miles, the lease providing for only one landing place on each side. *Held*, that this was a sufficient grant to the plaintiff of a right of ferryage to and from the two places named; and that the defendant having started a ferry some two miles west of Belleville, running to a point nearly opposite, in the Township of Ameliasburgh, was such a disturbance of the plaintiff's franchise as entitled him to a declaration of the right to the exclusive use of the ferry, together with an account of profits made by the defendant, and the costs of the suit.

Spragge, C.] [June 21.

MACAULAY V. KEMP.

Will—Costs of contesting.

The rule, that if there exist "sufficient and reasonable ground, looking at the knowledge and means of knowledge of the opposing party to question either the execution of a will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of the successful

party," acted upon in a case where the testator had, to several persons, spoken approvingly of the conduct of the plaintiff, a son of a deceased mother, and had expressed himself in such a manner as induced the plaintiff and others to believe that he would become a beneficiary under his uncle's will, instead of which his name was not mentioned in the will which had been prepared at the house of the widow of another brother of the testator, where he had for some time been residing, and was taken ill and died, although at the hearing the plaintiff's case entirely failed in proof.

Spragge, C.] [June 21.

BRIGGS V. LEE.

Pleading—Demurrer—Mechanic's lien—Lapse of time.

In a suit instituted by a party who had furnished materials for the erection of a warehouse to the contractor for building the same, it appeared that more than ninety days had elapsed from the time the materials were delivered before the bill to enforce the claim therefor, under the Mechanic's Lien Act, had been filed, and no registration of the alleged lien had been effected: a demurrer for want of equity was allowed with costs.

Spragge, C.] [June 21.

GRAHAM V. STEVENS.

Specific performance—Costs.

In a suit, at the instance of a vendor of land for the specific performance of an agreement to sell, the defence raised was that the land was agreed to be conveyed free from incumbrances, but the same was subject to a mortgage, and, therefore, that a good title could not be shewn. The report of the Master stated that the price agreed to be paid for the land was \$3,500; that \$1,800 was due on the mortgage, and that the purchaser had paid only \$100 on account of his purchase, "and that the non-completion of the contract (was) attributable to the desire of the purchaser to recede from the contract." The Court, on further directions, made a decree ordering defendant to specifically carry out the agreement and pay to the plaintiff the general costs of the case.

ANGERS vs. THE QUEEN INSURANCE COMPANY.

CANADA REPORTS.

QUEBEC.

QUEEN'S BENCH.

ANGERS *pro* REGINA, *Appellant*,

AND

THE QUEEN INSURANCE CO., *Respondents*.*Powers of Provincial Legislatures—Insurance—Trade and Commerce—Direct or indirect taxation.*

Appeal from the Superior Court of Quebec.

In this case the Attorney-General Angers had filed an information against the Queen's Insurance Company to compel them to pay the penalties which were imposed under a Statute of the Province of Quebec for not affixing a stamp to a policy of insurance, which they had issued in Quebec. The filing of the information was merely to try the question of whether the Statute was within the power of the Provincial Legislature. The Superior Court held that the Statute was *ultra vires* because it assumed to interfere with the subject of insurance, which that Court regarded as a branch of trade and commerce, and also because it imposed an indirect tax for the benefit of the Province. This judgment was upheld by the Court of Queen's Bench, and amongst other opinions delivered was the following. The case was carried by the Attorney-General to the Privy Council, and the judgment there given will be found in L. R. 3 Appeal Cases, p. 1090.

TASCHEREAU, J.—By the Act of the Legislature of Quebec, 39 Vict. ch. 7, entitled "An Act to compel assurers to take out a License," it is enacted that "every assurer carrying on in the Province any business of assurance, other than that of marine assurance exclusively (or business of assurance against accidents, for a period less than 30 days—40 Vict. ch. 6) shall be bound to take out a license, in each year, from one of the revenue officers, the price of such license to consist in the payment to the Crown for the use of the Province, at the time of the issue or delivery of any policy of assurance, and at the time of the making or delivery of

each premium, receipt or renewal, respecting such assurance, of a sum computed at the rate of three per cent. as to assurance against fire, or of one per cent. as to other assurances, for each hundred dollars, or fraction of one hundred dollars of the amount received as premium, or renewal of assurance, and such payment was to be made by means of adhesive stamps, equivalent in value to the amount required, to be affixed on the policy of assurance, receipt or renewal." Any person who shall not comply with the provisions of this Act is made liable for each contravention, to a penalty not exceeding fifty dollars, or in default of payment, unless the person be a corporation, to imprisonment not exceeding three months. The Act further declared that policies of assurance, premium, receipts or renewals, not stamped as required by the Act, could not be invoked, and are to have no effect in law, or in equity, before the Courts of this Province.

By the 122nd section of "The Quebec License Act," which is made applicable to the above Act, 39 Vict. ch. 7, by its 9th section, the Governor-in-Council may at any time, for sufficient cause in his discretion, revoke and annul any license thus granted to any Insurance Company, and by the 124th section of the same Quebec License Act, a fee of one dollar is payable to the revenue officer for every license given by him.

Had the Legislature of Quebec the power to pass this Statute? This is the abstract question, submitted for our decision in this cause and the only matter of dispute between the parties.

In England, Parliament is omnipotent. The power of Parliament is absolute and supreme, and Hallam (Const. Hist., vol. 3, p. 193) has not hesitated to say that "the absolute power of the Legislature, in strictness, is as arbitrary in England as in Persia." In this country it is very different. Since Confederation, both the Federal Parliament and the Local Legislatures have limited powers.

It is true that the Federal Parliament has a quasi sovereignty. Its jurisdiction is far greater than that of the Local Legislatures, but there are subject matters over which it has no jurisdiction. They are those matters, which, by the British North America Act, are left without any concurrent jurisdiction in the Federal Parliament, to the jurisdiction of the Local Legislatures.

The latter have only such powers as are specially assigned to them, and which are by exception taken from the Federal and given to the Local Legislatures.

Let us examine, therefore, whether, under the distribution of the Legislative Powers

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given by the Imperial Statute, the Legislature of Quebec could pass this Statute, imposing a tax on assurance companies and compelling them to take out a license?

The 91st section of the Imperial Act enacts that "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects, by this Act, exclusively assigned to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section it is hereby declared that (notwithstanding anything in this Act), the exclusive Legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated that is to say (*inter alia*):

2nd. The regulation of trade and commerce. 3rd. The raising of money or system of taxation, and any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act, assigned exclusively to the Legislature of the Province." This refers to the Federal Parliament. In dealing with the powers of the Legislatures of the Provinces, the 92nd section declares that "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated that is to say (*inter alia*):

* * * * *

"2nd. Direct taxation within the Province in order to the raising of a revenue for Provincial licenses," i. e. sub-sec. 9, shop and saloon purposes, for raising a revenue for provincial, local and municipal purposes.

The other parts of these sections have no bearing upon the present case.

The determination of this question depends entirely on the construction to be put on sub-sections 2 and 9 of the above 92nd section of the Imperial Statute.

The Federal Parliament has the general power to make laws in relation to all matters, excepting only such matters as are by the 92nd sec. specially put under the control of the Local Legislatures. The Local Legislatures, on the contrary, have power to make laws only in relation to matters specifically and nominally put under their control by section 92. In order to ascertain whether any given subject matter is under the jurisdiction of one of the legislative bodies, created by the Imperial Statute, it is sufficient to refer to the 92nd section and see if by that section the subject matter is

or is not put under the control of the Provincial power. If not it comes within the legislative authority of the Federal Parliament, even if not one of the classes of subjects specially enumerated as being specially reserved for that Parliament by the 91st section of the Act.

This proposition was not contested by the learned counsel whose duty it has been to contend, in favour of the constitutionality of this Act, but it is on the 92nd section that he relies, to prove that the Legislature of Quebec had the legislative authority to pass this Statute. He contended that it might be possible to consider the taxes imposed by 39 Vict. c. 7, as a direct tax. Then, under the 2nd sub-section of section 92, which gives the power of direct taxation to the Legislatures of the Provinces this Act is unimpeachable. But should it be declared that the duties imposed were not a direct tax, then the Act is constitutional, he says, because it is authorized by the 9th sub-section which gives to Local Legislatures the control of "Shop, saloon, tavern and other licenses."

As to whether the duties imposed on the Assurance Companies constitute a direct or an indirect tax, I will state without hesitation that, in my opinion, they constitute an indirect tax. It is a stamp duty, which has been imposed by the Legislature on policies of assurance and renewal receipts respecting such policies and nothing else. That it ought to be considered a stamp duty or a license does not make any difference as it is in both cases an indirect tax.

"On peut ranger sous deux chefs principaux (says J. B. Say, an author of great repute on Political Economy) les différentes manières qu'on emploie pour atteindre les revenus des contribuables. Ou bien on leur demande directement une portion du revenu qu'on leur suppose, c'est l'objet des *contributions directes*; ou bien on leur fait payer une somme quelconque sur certaines consommations qu'ils font avec leur revenu; c'est l'objet de ce qu'on nomme en France les *contributions indirectes*."

After stating what are *direct taxes*, the same author says: "Pour asséoir les contributions indirectes et celles dont on veut frapper les consommations, on ne s'informe pas du nom du redevable, on ne s'attache qu'au produit. Tantôt, des l'origine de ce produit, on réclame une part quelconque de sa valeur, comme on fait en France pour le sel. Tantôt cette demande est faite au moment où le produit franchit les frontières (les droits de douanes). Tantôt c'est au moment où le produit passe de la main du dernier producteur dans celle du consommateur qu'on fait contribuer celui-ci (en Angleterre par le stamp duty, en France

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Par l'impôt sur les billets de spectacles). Tantôt le gouvernement exige que la marchandise porte une marque particulière, qu'il fait payer, comme le contrôle de l'argent, les timbres des journaux. Tantôt il frappe non la marchandise elle-même mais l'acquiescement de son prix, comme il le fait par le timbre des quittances et des effets de commerce. Toutes ces manières de lever les contributions se rangent dans la classe des *contributions indirectes* parceque la demande n'en est adressée à personne directement, mais au produit ou à la marchandise frappée de l'impôt" [Say, Economie Politique, pp. 521, 523].

All our text writers and jurists agree in giving the definition of *indirect taxes* in the same language as that I have just cited. I will only add two others—Favard de Langlade et Merlin. The former says: "On appelle contributions indirectes les contributions établies par la loi sur les choses dont l'usage est ordinaire dans les habitudes de la vie. Elles sont indirectes en ce qu'elles ne portent nominativement sur aucun contribuable, qu'elles ne sont acquittées que par le consommateur, quelqu'il soit, ou celui qui veut user et qu'il suffit de ne pas consommer ou user pour n'y être pas assujéti. Ainsi, par exemple, celui qui ne se sert pas de papier timbré et n'use pas de tabac est sur de ne payer aucune partie des droits établis pour le timbre et sur les tabacs. Il en est de même pour toutes les branches des contributions indirectes" [Favard de Langlade, Repert. V. Contributions Indirectes].

And Merlin, Repert. V. Contributions Indirectes, says: "On distingue deux sortes de contributions, les contributions directes et les contributions indirectes. Les contributions directes sont établies directement sur les personnes. Les contributions indirectes sont, suivant la définition qu'en donne la loi en forme d'instruction du 8 Janvier, 1790, tous les impôts assis sur la fabrication, la vente, le transport et l'introduction de plusieurs objets de commerce et de consommation, impôts dont le produit, ordinairement avancé par le fabricant, le marchand, ou le voiturier, est supporté et indirectement payé par le consommateur. C'est aussi à cette classe qu'appartiennent les droits sur les tabacs, sur les cartes à jouer, sur le sel, sur les boissons, &c., &c." See also Demeunier, Economie Politique, vol. 3, V. Impôts.

There cannot be, in my opinion, a shadow of a doubt that the duties imposed on the Assurance Companies by the Legislature of Quebec, let them be called licenses or stamp duties, come distinctly within the definition given by the French authors, and should be classed in the category of indirect taxes.

If I now examine the English authors, I also find it impossible to declare that these duties on the Assurance Companies fall into the category of direct taxes.

"Taxes are either direct or indirect," says Mill. "A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs Most taxes on expenditure are indirect, but some are direct, being imposed not on the producer or seller of an article, but immediately on the consumer." (2 Mill, Pol. Econ. p. 415.) See also same volume, pp. 432, 458, 465, 466.

"A direct tax operates and takes effect independently of consumption or expenditure; while indirect taxes affect expenses or consumption, and the revenue arising from them is dependent thereon." 3 Smith's Wealth of Nations, pp. 3, 11 (10th Ed.) Taxes on operation, and those on commodities, are put in the same category. See Macdonnell—A Survey of Political Economy, p. 346. See also 2 Smith's Wealth of Nations, by Rogers, pp. 413, 466, and McCulloch's Principles and Practical Influence of Taxation and the Funding System, pp. 1 and 242.

In the United States the distinction between direct and indirect taxes is made upon the same principles as those upon which the French and English authors above cited make it.

Hilliard—Law of Taxation, par. 60—says, a license on particular pursuits is an indirect tax.

In the case of *Loughborough vs. Blake*, 5 Wheat. 517, Chief Justice Marshall, speaking of the celebrated duties which were the immediate cause of the American rebellion, says, "Neither the Stamp Act nor the duty on tea were direct taxes."

In the case of *Veazie vs. Fernald*, 8 Wall. 533, "A direct tax was held to be solely a tax either upon land or its appurtenances, or upon polls."

In *Pacific vs. Soule*, 7 Wall. 433, an income tax on the premiums, assessment, and dividends of an Insurance Company, were held not to be a direct tax, but a duty or excise.

The duties imposed by the Legislature of Quebec on the Assurance Companies, seem very much to be an indirect tax on the premiums. Moreover, cannot these duties be said to be excise.

What is excise? "Excise is the name given to the duties or taxes laid on certain articles produced and consumed at home; but exclusive of the duties on licenses, auctioneers and post horses, &c., &c., are in-

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cluded in the Excise duties." (Wharton Law. Lex. V. Excise.) M'Culloch's Dict. of Commerce, V. Excise, gives its definition in very much the same terms—"As a part of excise, the rates of duties on licenses are included as upon auctioneers, brewers, &c., &c." (M'Culloch on the Principles and Practical Influence of Taxation and the Funding System, p. 242.) And at p. 321, "The licensing of lotteries is also a mode of raising a revenue by indirect taxation." In fact, all authors agree in placing excise duties in the category of indirect taxes.

Another author, in the United States, says: "Taxes are usually divided into direct and indirect. The former includes assessments made upon the real and personal estate of the tax-payer, upon his income, or upon his head, the latter comprises duties upon imports and exports, excises, licenses, stamp duties, and the like." (Ripley's Amer. Cyclopaedia, V. Taxes.) It would seem that even in the British North America Act, the legislator did not consider that licenses were a direct tax. Had it been the intention to consider licenses as a direct tax, it would not have been necessary, after having given to the Local Legislature, by sub-sec. 2, the power to impose direct taxes, repeated in the 9th sub-sec. that the right to impose licenses on certain subjects was also within the legislative authority of the Provincial Legislatures. Does not the Act in so many words declare that the Local Legislature will have power to impose direct taxation, but as to indirect taxation, it is limited to imposing "shops, saloons, tavern, auctioneer, and other licenses."

I may add that in the case of *Regina v. Taylor*, 36 U. C. Q. B. 217, all the Judges composing the Court of Queen's Bench, as well as those of the Court of Error and Appeal, to wit: C. J. Draper and Richards, and Justices Morrison and Wilson, Strong, Burton, and Patterson, were of opinion that a license to be paid for by a brewer, or by a person to sell by wholesale, was an indirect tax. In the present case the character of the tax seems to me still more clearly established to be an indirect tax. For all these reasons, I am of opinion that the tax imposed on the Insurance Companies is not a direct tax, and, therefore, that under sub-section 2 of the 92nd section of the British North America Act the Local Legislature had no power to impose it. On this point there is no difference of opinion amongst us.

Moreover, I do not think I am mistaken if I state that it was not on the 2nd sub-section that the Legislature relied in order to pass this Statute in reference to Insurance Companies, or that they supposed that by this Act they were for the first time imposing a direct tax in the Province of Quebec. The

9th paragraph of the 92nd section is alone relied on, I think, as giving the Legislature authority to pass this Statute. This is the sub-section which gives to the Local Legislatures control over "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." And it is principally in the words "and other licenses" that the power to impose this tax on Insurance Companies is said to exist.

Let us see if by the words "and other licenses" the legislative provincial authority is thereby so very much enlarged.

It is clear on the simple reading of the Quebec Act, that the formality of taking out the license was thought of in order that the intended legislation would come within the authority of this 9th paragraph of the 92nd section of the Imperial statute. Nevertheless it is a "stamp duty" that has, in reality, been created. For, although there is a penalty of \$50 imposed in case of policies, or renewal receipts, issued without the required stamps affixed, yet we do not find any penalty imposed if an Insurance Company does not take out the license.

If the defendant Company in the case, The Queen's Insurance Co., had affixed stamps on its insurance policies, it would not have been subjected by the statute to any penalty for having refused or neglected to take out a license from the revenue officer.

The Act, it is true, enacts that each company shall take out a license, but this license is not for the purpose of the raising of a revenue for provincial, local, or municipal purposes." The dollar which is charged, or the cost of, or price of the license, is a fee which is paid personally to the revenue officer. Now, by the express terms of the Imperial Statute, it can only be for the raising of a revenue, for provincial, local, or municipal purposes, that a license may be imposed.

If, as in the present case, the license does not raise any money for any of these purposes, the Legislature of the Province has no power to impose it, and the statute imposing it must be declared *ultra vires*.

An Insurance Company need not take out any license, and thereby will not be subject to any penalty under this Statute, provided the policies and renewal receipts have stamps affixed—the object of the legislation has been attained. How can it be said that in such a case the license has produced a revenue when it is not even in existence?

I say, therefore, that by the express terms of the Imperial statute a license can be imposed only in order to raise a revenue. Here, on the face of the statute under consideration, the license which the companies are to take out cannot and could not pro-

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duce a revenue. The result is that this legislation is not authorized by the Imperial Statute.

I will now consider this case in its most favourable light for the Provincial Legislature—it is by admitting that the duties imposed are really license duties payable in stamps, on the transactions of the Insurance Companies.

Let us see whether the Legislature of Quebec had authority to pass such a law. First, can insurance companies be comprised in the words "and other licenses" which follow the words "shop, saloon, tavern, auctioneer," in sub-section 9 of section 92 of the Imperial Act. That is the question. A well-known rule of construction of statutes will solve this question. It is the rule which declares that "general words will be restrained to things of the same kind with those particularized." Under this rule it cannot be contended that Insurance Companies are comprised in the three words "and other licenses" of the Imperial Statute, for it cannot be said that they are *ejusdem generis* as "shop, saloon, tavern, auctioneer," which precede the words "and other licenses." This rule has been adopted in the United States as well as in England, and it has been held that a statute which speaks of auctioneers, &c., and all other trades, avocations, or professions whatever, does not include lawyers: Sedgwick Cons. of Stat. and Cons. Law. This rule is based on common sense, which naturally leads one's mind, to think first of the most important subjects comprised in a subject matter with which it may be occupied. Is it reasonable to think that the legislator would have enumerated specially "shop, tavern," &c., and would have left Insurance Companies as being comprised in the words "and other licenses." If it had been intended to give to the Provincial Legislature authority to license insurance companies, would they not have been specially mentioned? No doubt they would have been named the first of all.

And what would naturally have struck the mind of the Legislature at the time, in order that they might be unintentionally omitted, is that Insurance Companies by law were then obliged to take out licenses: 23 Vict. ch. 33, 1860; 26 Vict. ch. 43, 1863. (See also 38 Vict. ch. 20, and 40 Vict. ch. 42).

They are much more important than "shop, tavern, &c.," which have been particularly mentioned, and the Legislature cannot have intended by adding the words "and other licenses" to have included in these words, the power to tax institutions or industrial concerns which are so much superior to those mentioned immediately preceding these words.

This was the view taken in the case of the

Archbishop of Canterbury, 2 Coke's Rep. 46. "A Statute treating of persons or things of an inferior rank, cannot by general words be extended to those of a superior." This rule is applicable to every section of an Act, unless the contrary appears from the context of the whole Act. Now, by referring to the Imperial Statute, I find in reading the whole Act, that far from being unable to make the application of this rule to this section, it is evident, more especially so by referring to the 91st section, which regulates the legislative powers of the Federal Parliament (a clause to which I will more particularly refer hereafter) that the words "and other licenses," mean and are intended to include "and other licenses of the same kind, *ejusdem generis*." In the case of *Sandiman v. Breach*, 7 B. & C. 96, it was held, "Where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned." See also *Dwarris* 556, and *Maxwell on Statutes* 297.

Another consideration which strikes my mind is that if Insurance Companies are comprised in the words "and other licenses" then the banks, railroad companies and express companies are also comprised in these words, and if all these large companies could be compelled to take out licenses, then the Provincial Legislature would have power to impose stamp duties on promissory notes, bank shares, cheques, and on every ticket issued by a railroad company, and on bills of lading signed by express companies. The Legislature would also have the power to compel notaries to take out licenses, and to impose a stamp duty on each and every deed they would pass. In fact the power to tax indirectly would be unlimited. With the words "and other licenses," a stamp duty could be imposed on all things that might be made subject to the taking out of a license.

The revenues of the local governments could thereby be largely increased, and direct taxation would, no doubt, be avoided for a long time.

Can the Constitution have intended this? I do not think so, and in support of my opinion I will take the liberty of referring to the history of our Constitution, and of citing two or three extracts from the discussion which took place in our Parliament, at the time of the debates on Confederation. It is well known that, although the British North America Act is an Imperial Statute, it was on the Quebec resolutions previously adopted, that the Act was founded, and that the important debates on this project took place in Canada. It is true that numerous alterations were made in England to the resolutions passed by the Canadian Legislature; but when I compare

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the resolutions with the Imperial Statutes, I find that the clauses having reference to the distribution of legislative powers between the Parliament of the Dominion and the Local Legislatures, were not materially altered. So that what was said in the Canadian Parliament on these clauses may be considered as applicable to the sections of the Imperial Act now under consideration.

At page 94 of the Debates on Confederation, one of the speakers, after having spoken in reference to the subsidy to be given by the Federal Government to the Local Governments, adds: "If this, from any cause does not suffice, the Local Governments must supply all deficiencies from direct tax on their own localities." And at pp. 384, 385 another speaker seems also to be clearly of opinion that the sources of revenue for the Province of Quebec were to be under Confederation those which existed at that time, and previously, and that the only mode of increasing the revenues would be by direct taxation. At pp. 67, 68, 69, a third speaker, is very clear and unambiguous language on this point, the fact that this person was at the time Minister of Finance for Canada adds very much weight to his remarks, when the question under consideration was to provide for the financial position of the Provinces under the proposed scheme. I will give the following extracts:

"I now propose, sir, to refer to the means which will be at the disposal of the several Local Governments to enable them to administer the various matters of public policy which it is proposed to entrust to them.

"It will be observed that in the plan proposed there are certain sources of local revenue reserved to the Local Governments, arising from territorial domain, lands, mines, &c., &c. In the case of Canada, a large sum will be received from these resources; but it may be that some of them, such as the Municipal Loan Fund, will become exhausted in the course of time. We may, however, place just confidence in the development of our resources, and repose in the belief that we shall find in our territorial domain, our valuable mines, and our fertile lands, additional sources of revenue far beyond the requirements of public service. If, nevertheless, the local revenues become inadequate, it will be necessary for the Local Government to have resort to direct taxation." It is evident the speaker was not of opinion that Local Legislatures would be able to dispense with direct taxation by means of license duties. Further on he says, "The House must now, sir, consider the means whereby these local expenditures have to be met. I have already explained that in the case of Canada, and also in that of the Lower Provinces, certain sources of revenue are set aside as being of a purely

local character, and available to meet the local expenditure, but I have been obliged in my explanations with regard to Canada, to advert to the fact that it is contemplated to give a subsidy of eighty cents per head to each of the Provinces. In transferring to the General Government all the large sources of revenue, and in placing in their hands, with a single exception, that of direct taxation, all the means whereby the industry of the people may be made to contribute to the wants of the state, it must be evident to every one that some portion of the resources thus placed at the disposal of the General Government must, in some form or other, be available to supply the hiatus that would otherwise take place between the sources of local revenue and the demands of local expenditure."

By stating that "all the large sources of revenue, with the exception of direct taxation, were to be transferred to the General Government," the speaker could not have had the intention of giving to the Local Legislatures the large powers of licensing which the Quebec Legislature claims to have in the present case.

No doubt, the Imperial Statute must, as any other statute, be construed by itself, and the opinions I have referred to are not legal authorities. But can we not look at them in order to interpret this statute? And it is to be borne in mind, in referring to the history of our Constitution, that these persons whose opinions I have cited formed part of the preliminary conference where the resolutions on Confederation were framed. Can it be said that a commentary of a law by the author of that law should have no weight?

In France, do we not continually see commentators and text writers, in order to construe the text of the Code Napoleon, refer to the speeches made by Cambaceres, Freiluard, Bigot de Preameneu, Comte de Portales and others made during the discussion of the subject in the Council of State, at the Tribune, and in the Legislative Assembly.

I, therefore, come to the conclusion that the Local Legislatures, under the Imperial Statute, have only authority and power to impose licenses on "shop, saloon, tavern, auctioneer and other licenses *ejusdem generis*, and that Insurance Companies, not being *ejusdem generis*, as shop, &c., cannot be subjected to an indirect tax imposed by Local Legislatures.

So far I have not taken into account the commercial character of Insurance Companies. I have tried to find in the Imperial Act a power given to the Local Legislatures, by way of exception, to impose indirect taxes by license duties on any industry, (commercial or non-commercial) occupation,

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trade, profession, other than on "shop, saloon, tavern, auctioneers, and others of the same kind *ejusdem generis*, but I have not found such a power. It would not be necessary for me to add anything, for, as I have already remarked, I am of opinion, that as the power has not been given to the Local Legislatures, it comes within the legislative authority of the Federal Parliament, although, by section 91, it may not have been particularly and specially given. But I will go one step further, and taking into consideration that the respondents' company (and all similar companies) is a commercial company, and that its contracts are entirely of a commercial character. C. C. 24, 70. I find that by the Imperial Statute these companies and such companies, in express and clear terms, are subject to the legislative authority, and are under the exclusive control of the Federal Parliament. The 2 par. of the 91st section enacts, that the "Federal Parliament will have power to make laws relating to the regulation of Trade and Commerce." The Insurance Companies being commercial companies are therefore under the power of the Federal Parliament. It has not been contended by the Attorney-General of the Province of Quebec that the Federal Parliament had not legislative authority over these companies, but it was apparently urged that the Local Legislatures had a concurrent power, or rather, if I am not mistaken, it was admitted that the Local Legislatures could not regulate these companies, but that they had the power to oblige them to take out a license for the purpose of raising a revenue, and this was not to regulate them, and that in the present case it had not been the intention to regulate the trade of these companies, but the intention of the Legislature of Quebec was to raise a revenue. I am ready to admit that the intention of the legislature was to raise a revenue, but is not this legislation virtually "a regulation of trade and commerce," and in one of its most extensive and largest branches. First a duty is imposed on the companies to take out a license, and to be continually doing business under license. What is a license? It is a permit,—leave granted. What is the origin of the word? Undoubtedly *Licet licere*, to grant leave. Now, in order to grant leave you must have power to prohibit. He who can grant leave, must first of all have authority to prohibit it. Now, I am certain the Legislature of Quebec will not contend they have power to prohibit or prevent Insurance Companies from doing business in the Province. It is true this legislation does not prohibit them, but it has imposed upon them certain conditions. The law says, "Before you can do any business in our Province you must first ob-

tain our leave." Can it be said this is not regulating? The law also says, "If you do not comply with certain formalities your policies and your receipts will be null and void." Is this not regulating them, in fact is it not assuming the power to prevent them from doing business?

The defendant company has obtained from the Federal Government the license, the leave to do business in the Province of Quebec. In order to get the license they have deposited \$15,000, and they have paid, and pay jointly with other companies, an annual tax to the Dominion of \$3,000, and have complied with all the provisions of the Dominion Statute 38 Vict. c. 20. But it is contended that all this does not even give it authority to issue a single policy. The Province of Quebec steps in and says, "If under your license from Ottawa, you issue a single policy, or receipt, we enact they shall be null unless you submit to the conditions we impose upon you." They say, "We might, notwithstanding your license from Ottawa, expel you from the Province of Quebec, prevent you from carrying on your trade, but we will permit you, but on these conditions." I do not think the Province of Quebec has such powers, first, because they are not given by the 92nd section of the Imperial Statute, and consequently belong to the Federal Parliament; and secondly, because they are given specifically by the 91st section, under the words, "regulation of trade and commerce," to the central power. No doubt as it has been very properly remarked by the counsel representing the Attorney-General, a literal interpretation of these two sections would make them contradictory on some points.

The 91st section declares that the Federal Government shall have power to tax in every possible mode, and this includes direct taxation.

The 92nd section declares that the Local Legislature has exclusively the power of direct taxation. A literal interpretation of these two sections would make them contradictory. It has been stated somewhere that in order to reconcile these two sections, the word "exclusively" must be construed as referring to the Imperial power. I do not concur in this view, the word was taken in the resolutions on Confederation sent from Canada and it was certainly not the intention of referring them to the Imperial power. I prefer to admit that there is a contradiction in the letter of the Statute, and construe the sections as giving the power of direct taxation both to the central and local power, and this is in accordance with the well known rule "where a general intention is expressed in a Statute and the Act also expresses a particular in-

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tention incompatible with the general intention, the particular intention shall be considered as an exception : " Per Best C. J. in *Churchill v. Crease*, 5 Bing. 480-492. It is true that by the 91st section the Federal Parliament exclusively has the power to tax in every mode, but sec. 92 gives specifically to the Local Legislatures the power of direct taxation, then according to the above rule direct taxation must be considered by section 92 as being excepted from the monopoly given in general terms, by the 91st section to the Federal Parliament. The same rule is applicable to the construction of the other paragraphs of these two sections. Thus, although by the 91st section the Federal Parliament has the exclusive power of taxing in every mode, and of regulating trade and commerce, shop, saloon, tavern, auctioneer licenses and other licenses of the same kind come within the jurisdiction of the Local Legislatures, and that because the power is given specifically by the 92nd section, and *vice versa*, although the 92nd section gives the power of direct taxation and of indirect taxation by means of the licenses just mentioned the Federal Parliament has also the power of direct taxation and indirect taxation by means of said licenses, because the 91st section gives them the power specifically of imposing all kinds of taxes, which is one of the essential elements of sovereignty, and at the same time giving an exclusive control over the regulation of trade and commerce. The concurrent legislative authority over these subject matters by the Federal Parliament and the Local Legislatures can only exist as to direct taxation and the granting of "shop, saloon, tavern, auctioneer and other licenses, *ejusdem generis*. It is not however necessary for me to consider in this cause the different questions which may arise from the concurrent powers given to these legislative bodies, as I am of opinion for the reasons I have before given, that the licenses imposed on the insurance companies cannot be said to be a direct tax, and are not comprised in the words "shop, saloon, tavern, auctioneer, and other licenses."

It was stated on the argument that municipal taxes are somewhat in a similar position as these. Without wishing to express an opinion in one sense or the other, as to the constitutionality of any legislation relating to the municipal system I will say that it is quite possible that such legislation would come within a different class of subject matters and within certain other sections of the Imperial Statute, which I have had occasion to refer to. I allude to the 129th section which declares that the existing laws before Confederation in each Province, shall continue to remain in force,

and gives power to the Dominion Parliament and to the Local Legislatures to repeal, alter or modify them according to their respective jurisdiction, as well as by paragraph 8 of the 92nd section which puts the municipal system under the control of the Local Legislatures. But I will repeat, it is not necessary for us to express any opinion on this portion of the Imperial Statute.

By this suit the Attorney-General for the Province of Quebec, *pro Regina*, claims from the Defendant's company a penalty of one hundred and fifty dollars for issuing three insurance policies without having affixed to them the stamps required by the Statute passed by the Legislature of the Province of Quebec. The Superior Court has decided that this Act passed by the Legislature of Quebec is unconstitutional and has dismissed the plaintiff's action. I am of opinion that this judgment ought to be confirmed.

UNITED STATES REPORTS.

SUPREME COURT OF MISSOURI.

SMITH v. THE ST. LOUIS, KANSAS CITY, AND NORTHERN RAILWAY COMPANY, APPELLANT.

Continuation of note to this case from the "American Law Review," from p. 178 ante.)

§ 5. *Application of these Principles to Railway Service.*—From the foregoing principles it is obvious that it cannot be stated without qualification that "it is the duty of railroad companies to keep their road and works, and all portions of their track, in such repair, and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers, or servants, or others;" that "they are bound to furnish a safe road and sufficient and safe machinery or cars;" and that "the legal implication is, that the roads will have to keep a safe track, and adopt all suitable instruments with which to carry on their business." The court in the principal case was clearly right in disapproving these statements of doctrine, when taken literally and without qualification. So far from being an insurer of the safety of its servants, as the above language would indicate, a railway company is not even an insurer of the safety of its passengers.

It is to be observed, however, that this expression did not originate with Judge Wagner. It is found, in substance, in a celebrated judgment of Bigelow, C. J., of the Supreme Judicial Court of Massachusetts, in *Snow v. Housatonic R. Co.*, a case which has been much cited and followed by other courts. This case has never been understood as holding that a railway company is an insurer, as to its servants, of the safety of its roadway, rolling stock, and other instrumentalities. It is simply meant to declare that it is under an obligation similar in kind, if not in degree, to its servants to that which the law imposes upon it as to its passengers. And there is manifest sense in

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this. From the nature of case, a railway employé has no opportunity of knowing the exact extent of the risk he assumes when he enters the service. Generally speaking, he has neither the skill nor the opportunity to inspect a railway track several hundred miles in length, nor its numerous side-tracks, bridges and grounds, nor the numerous locomotives and cars, partly belonging to the particular company, and partly coming from other roads, which will be employed upon it. Suppose, for instance, a railway brakeman, out of employment, presents himself to the master-mechanic of a particular railway company for a "job." The master-mechanic, who is here in law the vice-principal of the company, knows that a bridge over which the brakeman will have to pass is dangerous; he knows that on some portions of the track over which he will have to pass the ties are rotten and the rails liable to spread; he knows that some of the engines are old, rickety and dangerous, and that some of the cars which are still in use are worn out and ought to be condemned. From the nature of the case he cannot inform the applicant of the exact extent of these dangers, and he takes him into the service of the company without apprising him of them. Now, it is to this state of facts, which is the usual state of facts which presents itself in such cases, that the language before quoted applies. The brakeman, on entering the service rightfully assumes that the railway company has not been so far wanting in ordinary social duty as not to have made reasonable provisions for the safety of its employés. And under such a state of facts it may well be said that the legal implication is that it has done this.

This is but an illustration of the fact that you cannot generalize any set of legal rules so as to make them apply in all situations. The law is not, and never can be made, an abstract science. Its rules must always be viewed in the concrete. They can never be divorced from the particular subjects to which they have been declared applicable. There is no better illustration of this than the very subject we are considering. A mechanic on entering service in a manufacturing establishment, where his practised eye may, in an hour, take in all the "seen dangers" of the service, may well be held to have accepted the risk of those dangers, when, for the reasons already stated, no such implication would arise in the case of one entering the service of a railway company.

It is under the influence of such considerations as these that we find a tendency on the part of several authoritative courts to hold railway companies, in respect to the safety of their employés, to a liability similar in kind, though not so strong in degree, as that which they are under to passengers on their trains. Thus, the Supreme Court of Pennsylvania has declared that a railroad company is under an obligation to keep a sound track for the safety of all persons who are transported over it, whether passengers or servants. This is deemed a direct and immediate duty, the non-performance of which will not be excused by the remote negligence of its servants, who fail to report its condition or to put it in repair. If the substructure carrying the rails is suffered to lie until it has become rotten and unsafe, this is deemed the negligence of the company itself, and not merely that of its servants. Casualty from such a cause is not one of the ordinary perils which presumptively every one incurs who takes service with the company. It is not likened to the breaking of a rail from mere accident, or from some cause immediately traceable to the negligence of

another employé. Another court has said that duty of such a company is to furnish good, well-constructed machinery, adapted to the purpose for which it is used, of good material, and of the kind that is found to be most safe when applied to use; it is not required to seek and apply every new invention, but must adopt such as is found by experience to combine the greatest safety with practical use.

The Supreme Court of Tennessee has said, speaking of the obligation of a railway company to its employés, "The general doctrine is, that in proportion to the importance of the business, and the perils incident to it, is the obligation of the company to see that the engines and apparatus are suitable, sufficient, and 'as safe as care and skill can make them';" which, no doubt, expresses correctly the extent of their obligation to passengers, but not to their servants.

The Supreme Court of Illinois declares that the result of previous rulings is, not to hold these companies as insurers that their road, appurtenances, and instrumentalities are safe and in good condition, but that they will do all that human care, vigilance, and foresight can reasonably do, consistent with the modes of conveyance and the practical operation of the road, to put them in that condition to keep them so. "The duty owing by a railroad company," said Breese, J., "to the public, as well as to those in their employment, is that their road, and bridges and other appurtenances, shall be constructed of the best material, having in view the business to be done upon it. In their construction they should equal those of the best roads doing an equal amount of business, and the utmost care and vigilance [should be] bestowed upon keeping them in a safe condition. The law will not allow them to be out of repair an hour longer than the highest degree of diligence requires. And, further, it is their duty to keep a sufficient force at command, and of capacity sufficient to discover defects and apply the remedy. Neglecting to keep it in the best condition, if injury or loss occurs thereby, the companies will be liable, and they ought to be so liable. From this responsibility they cannot be relieved except by showing that the defect was one which could not be discerned or remedied by any reasonable skill or foresight." Accordingly, an instruction which leaves out of view this strong obligation, but places the liability of the company upon actual knowledge of the defective construction, is held erroneous. There may be cases where the question, whether it was the duty of a locomotive engineer to inspect the track, will be a question for the jury. It was so held where, in passing trains over the tracks of two other railroads, temporary rails had been laid down as often as required, of which the engineer of a construction train, who was injured in consequence of his engine running off the track at this point, had notice.

Such a company has been held responsible in damages to an employé for an injury resulting, without his negligence, from a tank or other appendage of the road, so negligently constructed as to subject the employé to unnecessary and extraordinary danger, which he could not reasonably anticipate or know of, and of which he, in fact, was not informed. But a railway company is under no legal obligation to build its bridges so high that a man may pass under them safely while standing upon the top of a box-car; and if one of its servants is killed or injured by being struck by such a bridge while standing upright on such a car or nearly so, he being acquainted with the height of the bridge, his misfortune will

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be attributed to his own negligence, and not to the negligence of the company. On the same grounds, where the conductor of a freight-train was struck and killed by the projecting roof of a depot-building, and it appeared that the deceased had lived for many years at the place of injury; that he had for a long time been familiar with the road, passing over it daily; and it did not appear that any change had been made in the building or in the road since he became an employé on the road, it was held that there could be no recovery of damages. In entering upon the service the servant assumed the risk of the premises as he found them.

Where a railroad company so constructed a side-track that all trains coming from one direction, in order to switch cars upon it, were obliged to make what is known as the "flying switch," and a switchman employed at the station was killed in the night-time, in attempting, when signalled, to run from the station-house to the switch in order to turn it, the company was held liable, on the ground that it had been negligent in failing to establish proper rules and regulations for making the "flying switch," and in failing to provide the cars which were attempted to be switched with good and sufficient breaks and with the proper number of lights. Where a breaksmen was killed in making what is known as a "flying switch," in consequence of the fact that a particular car had no ladder on it by which he could ascend to apply the break, it was held that the following instruction, fairly construed, was not in conflict with the rule which exacts of the master, in the furnishing of machinery, only reasonable or ordinary care: "It was the defendant's duty to provide cars with such appliances as are best calculated to insure the safety of the employes; and if a ladder on the end of the car, or a handle as described by the witness, would be a better protection to life than the car which produced the accident, then it would be the defendant's duty to furnish a car with such appliances." A fair construction of this language, under the circumstances of the case, did not warrant the supposition that it exacted of the defendant the highest degree of skill and the procuring of the very best appliances, but rather those appliances which were reasonably best calculated to answer the end proposed, as compared with those which the company did furnish. In Tennessee it has been ruled, with obvious propriety, that a statute providing that "every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always on the lookout ahead, and when any person, animal, or other obstruction appears upon the road, the alarm-whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident," did not apply to the running of engines and trains about the depots and yards of railroads, nor did it have reference to the protection of the employes of a railroad when moving across the track in the discharge of their duties.

It is also incumbent upon railway companies to use ordinary prudence in making and publishing to their employes sufficient and necessary rules and regulations for the safe running of their trains, and for the government of their employes. For an injury to one of its employes, arising from the want of such regulations, such a company will be adjudged to pay damages. But it being

impossible for a railway company to move its trains when being made up, or when broken up, according to a time-table, the omission to provide regulations as to the time of moving trains engaged in and about the freight and engine houses and depots of the company is not negligence. But it is practicable to prescribe in what manner engineers and conductors shall give notice of the approach of an engine, with or without cars, when trains are being made up or are moving about freight-houses, depots, or engine-houses; and, if proper precautions are not taken for the protection of life and limb from negligence by such engines and trains, a person injured, who is not an employé of the company, has just cause to complain, and is entitled to recover damages for any injury sustained by reason of the omission of the company to adopt such reasonable guards against liability to injury. But one who enters into the employ of the company with full knowledge that no provision has been made for protecting its servants against injury from moving trains or engines has no claim to recover damages if he sustains injuries by reason of the company omitting to make such provisions and regulations as prudence and a proper regard for the lives of others might require. Thus, where two railway companies were in the joint occupation of a station, and a servant of one of them, while engaged under a car on the siding, repairing it, was killed in consequence of another car being shunted against the car under which he was, and it was found that there had been no negligence on the part of any of the employes, but that the accident arose from the fact that the rules were defective, it was held that the company whose servants shunted the car must pay damages. And, where a railroad company constructs a side-track so that it has but one connection with the main track, in consequence of which all trains coming from one direction, in order to switch cars upon the side-track, must make what is known as the "flying switch," it has been held incumbent on the company, out of regard for the safety of its employes, to make and publish rules and regulations to be by them observed in this dangerous operation.

The subject under consideration may be illustrated by referring to a large class of actions brought for injuries received by railway brakemen in coupling and uncoupling cars. This duty, as is well known, is highly dangerous, even under favourable conditions. It is therefore obvious that the rule of ordinary care already stated would place the company under a degree of care, in providing its cars with safe apparatus for this purpose, which, applied to ordinary situations, would be denominated extraordinary. Yet it is held, even here, that such a company is not liable for an injury received by a brakeman in coupling cars having double buffers, simply because a higher degree of care is necessary in using them than is demanded in the use of those differently constructed. Nor is such a company obliged to discard cases of an old pattern simply because it is more dangerous to couple them to cars of a new pattern than it is to couple new cars to each other. In all these cases care must be taken to note the distinction between a vice common to a whole class of cars, with which the brakeman may be supposed to be familiar, and a vice peculiar to a particular car,—such as a defective draw-bar, of which the brakeman may have no knowledge.



Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 43RD VICTORIÆ.

During this Term, the following gentlemen were called to the Bar. The names are placed in the order in which they stand on the Roll of the Society, and not in the order of merit.

SAMUEL SKEFFINGTON ROBINSON.
ALEXANDER GRANT.
JOSEPH BOOMER WALKER.
EBENEZER FORSYTH BLACKIE JOHNSTONE.
FRANK FITZGERALD.
GEORGE A. F. ANDREWS.
THOMAS STEWART.
HENRY SCHUYLER LEMON.
JAMES HENDERSON SCOTT.
EUGENE DE BEAUVOIR CAREY.
GIDEON DELAHAY.
GERALD FRANCIS BROPHY.
WILLIAM HENRY DEACON.
ROBERT W. SHANNON.
DANIEL McLEAN.
ARTHUR WILLIAM GUNDRY.
JOHN NICHOLSON MUIR.
JOHN BROWN McLAREN.

On the 19th May the following gentlemen were admitted as Students-at-Law and Articled Clerks, namely :—

Graduates.

ROBERT PEEL ECHLIN.
WILLIAM HENRY WILBERFORCE DALEY.

Matriculants.

ALEXANDER B. SHAW.
LEONARD HUGH PATTEN.

Junior Class.

DOUGLAS ALEXANDER.
PAUL KINGSTON.
THEOPHILUS BENNETT.
EDWARD W. J. OWENS.
ALBERT J. FLINT.
DONALD MACDONALD.

Articled Clerk.

WILLIAM DUNCAN SCOTT.

And on the 22nd May the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

C. H. IVEY.
CHARLES R. IRVINE.
RICHARD WALLACE ARMSTRONG.

By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, *Fasti*, B. I., vv. 1-300; or,
Virgil, *Æneid*, B. II., vv. 1-317.
Arithmetic.
Euclid, Bs. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

Students-at-Law.

CLASSICS.

- 1880 { Xenophon, *Anabasis*, B. II.
Homer, *Iliad*, B. IV.
1880 { Cicero, in *Catilinam*, II., III., and IV.
Virgil, *Eclog.*, I., IV., VI., VII., IX.
Ovid, *Fasti*, B. I., vv. 1-300.
1881 { Xenophon, *Anabasis*, B. V.
Homer, *Iliad*, B. IV.
1881 { Cicero, in *Catilinam*, II., III., and IV.
Ovid, *Fasti*, B. I., vv. 1-300.
Virgil, *Æneid*, B. I., vv. 1-304.

Translation from English into Latin Prose.
Paper on Latin Grammar, on which special stress will be laid.

LAW SOCIETY, EASTER TERM.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, B. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem:—

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1880.—Souvestre, Un philosophe sous les toits.

1881.—Emile de Bonnechose, Lazare Hoche.

OR NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Sommerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, chapters on Agreements, Sales, Purchases,

Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Criminal Law, and Books III. & IV. of Broom's Common Law, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Haynes's Outline of Equity, C.S.U.C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings, Equity Pleading and Practice in this Province,

The above changes shall be in force after next Easter Term.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the 2nd Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

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DIARY FOR AUGUST.

1. Sun....Tenth Sunday after Trinity.
5. Thur...Atlantic Cable laid, 1858.
8. Sun... Eleventh Sunday after Trinity.
11. Wed...Battle of Lake Champlain, 1814.
13. Fri...Sir Peregrine Maitland, Lieutenant-Governor of Upper Canada, 1818.
15. Sat...Twelfth Sunday after Trinity.
17. Tues...First Intermediate Examination. Gen. Hunter, Lieut.-Governor of Upper Canada, 1799.
19. Wed...Second Intermediate Examination.
20. Thur...Examination for Admission.
21. Fri...Examination for Call.
22. Sat...Long Vacation JQ. B., C. P. and Co. Court ends.
23. Sun...Thirteenth Sunday after Trinity.
24. Mon...Trinity Term begins.
25. Wed...Francis Gore, Lieutenant-Governor of Upper Canada, 1806.
26. Thur...Re-hearing Term in Chancery begins.
27. Sun...Fourteenth Sunday after Trinity.
28. Tues...Long Vacation in Supreme Court, Exchequer Court, Court of Appeal and Chancery ends.

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Canada Law Journal.

Toronto, August, 1880.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO—JUNE 26.

MARTIN V. CONSOLIDATED BANK.

*Security for costs—R. S. O. c. 50, s. 71—
Practice.*

An order for security for costs cannot be obtained under sec. 71 of the Common Law Procedure Act (cap. 50, R. S. O.), upon an affidavit made by the defendant's attorney, as that section requires the affidavit to be made by the defendant personally.

Roaf, for plaintiff.

J. K. Kerr, Q. C., contra.

FARRINGER V. McDONALD.

*Chattel mortgage—Affidavit—Debt payable
at future day.*

The affidavit annexed to a chattel mortgage omitted the words, "or accruing due," after those "so justly due."

Held, that the debt might be stated as due when it really was due, and that it need not be necessarily stated as either due or accruing.

The mortgage showed the debt in the proviso as one becoming due and payable at a future day, but the consideration was stated to be money acknowledged to be paid for the transfer of the property, and the evidence showed it was given to secure an over-due debt.

Held, that the mortgage could be upheld, regarding it as given for a present debt payable at a future day.

The affidavit stated that the mortgage was not executed for the purpose of protecting the goods against the creditors of the said mortgagors, naming them, or pre-

Q. B.]

NOTES OF CASES.

[Q. B.]

venting the creditors of the said mortgagor from obtaining payment of any claim against him, the said mortgagor.

Held, sufficient in substance to meet the fact of there being two mortgagors instead of one.

Richards, Q. C., for plaintiff.

McCarthy, Q. C., *contra*.

AGRICULTURAL SAVINGS SOCIETY V. THE FEDERAL BANK.

Banking.

Plaintiffs, a money loaning company, issued cheques upon defendants with whom they kept their account, payable to B. or order. These cheques were obtained by a third party, who indorsed them in B.'s name, and got the money on them. The cheques having been charged by defendants against plaintiffs,

Held, that the latter were entitled to recover back from defendants the amount represented by the cheques, as having been improperly charged against them.

Bayley, for plaintiffs.

J. K. Kerr, Q. C., *contra*.

JONES V. GRAND TRUNK RAILWAY CO.

Railway Co.—Explosion of fog signal—Negligence—Nonsuit.

Plaintiff, while standing on the platform at one of defendants' stations, had his eye injured by the explosion of a fog signal which had been placed on the track. The only evidence given was that certain servants of defendants had those fog-signals in their possession for lawful purposes, but that no one, to the knowledge of several employees of the company, who were called as witnesses, placed this one on the track, and it appeared not impossible that it might have been obtained from them by some third party, or might have been put there by a servant of the defendants for a frolic and not for any purpose of the company, or their business.

Held, that a non-suit had been properly directed.

Wallbridge, Q. C., for plaintiffs.

Bethune, Q. C., *contra*.

RE MCLEAN AND TOWNSHIP OF OPE.

Drainage By-law—Omission in notice published—By-law varied by Court of Revision and Judge—Assessment of property in such cases—Interest of member of Court of Revision and Councillor.

The omission of the words "during the term next ensuing the final passing of the by-law," from the published notice do not render the by-law invalid.

Where a by-law finally passed differs from that published only in respect of changes made in assessment by the Court of Revision and County Judge on appeal, it is not necessary to publish such by-law again after such changes.

Where the person who made the assessment was not notified and not present at Court of Revision,

Held, no ground for setting aside the by-law.

The Engineer is the proper person to make the assessment.

The principle on which the assessments were made in this case was held not erroneous, but this Court would not interfere on such grounds, as these are matters of complaint to the Court of Revision.

No interest that springs solely from his being a rate-payer in the municipality can disqualify a councillor or a member of the Court of Revision from performing his duties as such.

BELL V. IRISH.

Distress for rent—Justifying as owner.

Where a party distrains, as landlord, on goods which, as a matter of fact, had, by subsequent agreement between himself and tenants, but before the distress, become his absolutely. *Held*, that he may justify the taking on this latter ground.

ARMOUR J., dissenting, on the ground that the instrument under which the defendant claimed the goods had not the effect of transferring the property in them to defendant.

P. S. Martin for plaintiff.

J. K. Kerr, Q. C., *contra*.

Q. B.]

NOTES OF CASES.

[Q. B.]

MILLER V. GRAND TRUNK RAILWAY CO.*Railway Company—R. S. O. ch. 199.*

Held, that the defendants, a railway company, were not subject to the provisions of R. S. O. ch. 199.

H. J. Scott, for plaintiff.

Bethune, Q. C., *contra*.

MARTIN V. BEARMAN.

Assignee of chose in action—Subsisting equities.

Held, that the assignee of a chose in action, in this case a chattel mortgage, takes subject not merely to the state of the account, but to all the equities subsisting between the original parties.

R. Martin, Q. C., for plaintiff.

Osler, Q. C., *contra*.

TIMMINS V. WRIGHT.

Malicious prosecution—Proof of affidavit and Judge's order—Secondary evidence.

Held, that a County Court Judge's order is well proved under R. S. O. c. 62, sec. 28, by the production of a copy, certified as such, under the hand of the Clerk of the Court, and with a seal attached to such certificate purporting to be the seal of the Court; but that an affidavit filed in that Court is not duly proved by a copy similarly certified and sealed.

Richards, Q. C., for plaintiff.

McCarthy, Q. C., *contra*.

MOSHERY V. COBOURG.

Corporation—Pleading—Amendment.

The plaintiff sued "The Commissioners of the Cobourg Town Trust," in whom the harbour at Cobourg is vested in fee by statute, 22 Vict. cap. 72, for damages, for loss of his vessel caused by negligence of defendants. The defendants pleaded only, not guilty and negligence of plaintiff. At the trial plaintiff was non-suited on the objection, that defendants were sued as a corporation, but were not so under the statute.

Held, that this objection should have been raised by plea, and was not open to the defendants on this record.

At the trial plaintiff asked leave to amend by adding the names of the trustees, which was refused.

Held, that amendment asked was proper, and the case should not have been stopped.

Bigelow for plaintiff.

J. K. Kerr, Q. C., *contra*.

TRUST & LOAN CO. V. LAWRAISON ET AL.

Distress clause in mortgage.

A mortgage was drawn under the Act as to Short Forms of Mortgages, with the addition of a clause that the mortgagor did "at-torn and become tenant at will to the company, subject to the said proviso" (for redemption). The mortgagee never executed the mortgage, which named a day for payment of principal more than three years from the date of the mortgage and intermediate days for payment of interest in advance.

Held, per HAGARTY, C. J., that a tenancy at will was created at a fixed rent equivalent to the interest, for which the mortgagee had all the remedies of a landlord.

Per CAMERON, J., though not dissenting, that the distress clause had the appearance of being an evasion of the Chattel Mortgage Act.

Robinson, Q. C., for plaintiffs.

Leith, Q. C., *contra*.

MCCARTHY V. ARBUCKLE.

Ejectment—Death of defendant—Amending rule by adding parties.

In an action of ejectment, the plaintiff recovered a verdict for the land claimed, but the defendant was held entitled to recover the value of his improvements, he having made them under a *bona fide* belief of title, and the matter was referred to the master to report thereon. The Master accordingly made his report, which was moved against. After the Master had made his report, the defendant died, leaving a son by a former wife, his widow; and it appeared that a loan society had had an interest in the improvements assigned to them. The Court permitted the plaintiff to amend his rule *nisi* by calling on the widow and son, and on the loan society, to show cause why they should not be made

Q. B.]

NOTES OF CASES.

[C. P.]

parties, and why the former should not be appointed under the ninth section of the A. J. Act, to represent the estate of the defendant on this motion, and on all subsequent proceedings in the reference—the rule to be returnable after fourteen days notice before a single judge.

Snelling for the plaintiff.

CLENCH, ASSIGNEE, v. CONSOLIDATED BANK.

Insolvency—Banking account—Transfer of moneys by assignee from estate to separate account—Liability of bank to reimburse.

One McE., who was the assignee of an Insolvent's estate, kept the estate account as well as his private account at the defendants' bank. Certain notes belonging to the estate were in McE.'s hands, as such assignee, and were deposited with the defendants for collection, and the proceeds placed to the credit of the estate, but which McE. drew out by cheque as assignee, and then deposited to his private account, and they were used for his private purposes. McE. then absconded, and the plaintiff was appointed assignee of the estate in his place. In an action against the defendants to recover the amounts of the said notes,

Held, that he could not recover for debt; the defendants were under no liability to reimburse the estate with the said amounts.

J. K. Kerr, Q.C., for the plaintiff.

J. A. Miller, for the defendants.

COMMON PLEAS.

IN BANCO.—JUNE 25.

PEAK v. SHIELDS.

Sec. 136 of Insolvent Act—Crimes—Civil procedure—Right of Parliament of Canada to enact.

Held, that the acts referred to in sec. 136 of the Insolvent Act are not by that section constituted crimes, punishable as such under that and the following sections.

Held, also, that the right of the Provincial Legislature to direct the civil procedure in the Provincial Courts has reference to the procedure over which the Legislature

has power to give those Courts jurisdiction, and does not in any way interfere with or restrict the right or power of the Parliament of Canada to direct the procedure to be adopted in cases over which Parliament has jurisdiction.

J. E. Rose and *T. F. Blackstock*, for the plaintiff.

Bethune, Q.C., for the defendant.

GILDERSLEEVE v. McDOUGALL,

Contracts—Cause of action—R. S. O. ch. 50, sec. 49.

On 19th March, 1879, plaintiff, at Kingston, Ont., wrote to defendant at Montreal, "Please state price for forging, for cross-head for beam engine, steamer 'Hastings' (36 inch cylinder, diameter), to be finished here; very best material; telegraph me to-morrow." On the 20th, the defendant telegraphed in reply, "Will forge cross-head at seven cents per pound." On the same day the plaintiff replied by letter, "I am in receipt of your telegram in answer to mine, saying you will forge cross-head at seven cents per pound, and enclose drawing which explains itself. Please leave metal enough to finish up to the sizes in the drawing, and ship them here as soon as finished by G. T. R." On 22nd March, defendant replied by letter as follows: "Yours of 20th duly to hand, with sketch of cross-head enclosed. The same will have immediate attention, and as soon as ready I will ship to your address."

Held, that the plaintiff's letter of the 19th March and the defendant's telegram in reply comprises merely an enquiry and answer; and that the whole contract was contained in the plaintiff's telegram of the 20th March and the defendant's letter in reply accepting the order therein contained, and that the contract must be deemed to have been made at Montreal, where the final assent was given.

The expression "cause of action," in sec. 49 of the C. L. P. Act, R. S. O. ch. 50, does not mean the whole cause of action, namely the contract and breach, but the act on the part of defendant which gives plaintiff his cause of complaint.

In this case the cause of action was the

breach of the defendant's warranty that the forging manufactured by him was reasonably fit for the purpose for which it was intended. It was delivered and used for some time in Ontario, when it proved defective.

Held, that the breach of warranty occurred in Ontario, and therefore the cause of action arose there within the meaning of sec. 49.

B. M. Britton, Q. C., for the plaintiff.
Ogden, for the defendant.

DOMINION BANK V. BLAIR.

Principal and surety—Discharge of surety by mode of dealing with securities.

In the former judgment, reported in 30 C. P., the sole question was as to the validity of the bond. The other question upon which judgment is now given is whether even though the bond is valid, the plaintiffs had not so dealt with the property and securities of the principal debtor as to discharge the securities from all liability. The evidence failed to establish the defendant's contention, and the plaintiffs were therefore held entitled to recover.

Robinson, Q. C., and *W. Mulock*, for the plaintiffs.

Hector Cameron, Q. C., and *J. E. Farewell*, for the defendants.

LONG V. GUELPH LUMBER COMPANY, LIMITED.

Company—By-law to issue preference stock—Illegal conditions—Validity of shares.

The defendants, a company incorporated under the Ontario Joint Stock Letters Patent Act, passed a by-law under sec. 17 of the Act for the issue of \$75,000 of preference stock in shares of \$1,000 each, which was to have preference and priority as respects dividends and otherwise as therein declared, namely, 1. "The company guarantees eight per cent yearly to the extent of the preference stock up to the year 1880, and over that amount (8 per cent) the net profits will be divided among all shareholders *pro rata*. 2. Should the holders of preference stock so desire, the company binds itself to take that stock back during

the year 1880 at par, with interest at eight per cent per annum, on receiving six months' notice in writing," &c. The plaintiff subscribed for and was allotted five shares amounting to \$5,000, which he fully paid up, but contending that the by-law was *ultra vires* by reason of the above conditions, brought an action to recover back the money so paid by him for the shares.

Held, that the first condition of the by-laws was not *ultra vires*, as its proper construction was not that the interest was to be paid at all events, and so possibly out of capital, but only if there were profits out of which it could be paid; but that the second condition to take back the stock was *ultra vires*, the Act not empowering the company to do so.

Held, however, that the plaintiff could not recover, for that notwithstanding one or even both of such conditions were invalid, there was authority to issue the preference shares themselves which were therefore valid.

McCarthy, Q. C., for the plaintiff.

Bethune, Q. C., for the defendants.

MAHON V. NICHOLLS.

Venue—Change of—County Court cases—Order of Clerk of Crown—Appeal from.

Held, there is no appeal to the full court in term from the order of the Clerk of the Crown in Chambers on an application made under R. S. O. c. 56, s. 155, for a change of venue in County Court cases.

Semble: in such cases the proper course is to follow the practice in force in Superior Court cases.

R. M. Meredith, for the plaintiff.

Ogden for the defendant.

THE CANADA PERMANENT, &C., SOCIETY V. TAYLOR.

Free grant lands—Mortgage.—Execution by wife of patentee.

Under sec. 16 of the Free Grant and Homestead Act, R. S. O. ch. 24, patents to be issued for lands located under that Act must state, in the body thereof, the name of the original locatee; the date of the location, and that the patent is issued un-

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der the authority of the Act; and by sec. 15 no deed or mortgage of such lands shall be valid unless the wife of the locatee is one of the grantors with her husband and executes the same.

The patent in this case, of lands in the Free Grant District, granted the land absolutely to the patentee, without stating any of the requisites of sec. 16. The patentee mortgaged the land to the plaintiffs, his wife being a party to and executing the mortgage to bar dower.

Held, under the circumstances, that the land could not be deemed to have been patented under the said Act, and therefore it was not essential that the wife should execute the mortgage as a grantor; but even if essential, the wife being a party and executing the deed to bar her dower was a sufficient execution as such grantor within the meaning of the Act.

George Mackenzie for the plaintiffs.

Hector Cameron, Q.C., for the defendant.

CORPORATION OF STAFFORD V. BELL.

Surveyor—Negligence in making survey—Action for—Evidence.

Action against the defendant, a Deputy Provincial Land Surveyor, for negligence and unskilfully running the lines for the road allowances between lots 9 and 10 in the 1st, 2nd, 3rd and 4th concessions of the Township of Stafford, when employed by the plaintiffs to run such lines.

Held, OSLER, J., dissenting, that the evidence set out in the case established the negligence and unskilfulness of the defendants and that the plaintiffs were therefore entitled to recover.

Read, Q.C., for the plaintiffs.

Robinson, Q.C., for the defendant.

FENTON V. COUNTY OF YORK.

Administration of criminal justice—Expenses payable by county—County attorney—Mandamus.

On an application for a Mandamus to the County Board of Audit commanding them to rescind their order for the deduction of certain items amounting to \$39.92 charged by the County Attorney for expen-

ses incurred in the administration of criminal justice in the county, and which had been allowed on a previous audit, but disallowed on the audit of subsequent accounts because the Government had refused to pay them out of the Consolidated Revenue Fund of the Province, as not being mentioned in the schedule to the Act, R. S. O. chap. 86.

Held, that under the said Act only such of said expenses as mentioned in the schedule are payable out of the Consolidated revenue, and that the other of such expenses must be borne by the municipality out of the county fund.

Æ. Irvine, Q.C., for the plaintiff.

J. G. Scott, Q.C., for the Crown.

J. K. Kerr, Q.C. for the defendants.

CORNELL V. ABELL.

Chattel mortgage—Description of goods—Sufficiency.

In a Chattel Mortgage certain of the goods and chattels were described as follows: "One brown stallion ten years old, one bay horse eight years old, one black mare nine years old."

Held, a sufficient description.

Macbeth, for the plaintiff.

Riordan, for the defendant.

DOUGLAS V. FOX.

Shade trees on highways—Right of action by owner of adjacent land for injury thereto.

Held, that the owner of land adjoining a highway has such a property in the shade trees opposite his land so as to entitle him to maintain an action to recover damages against a wrong doer for cutting down and doing damage thereto.

Hazel, for the plaintiff.

G. B. Gordon, for the defendant.

McKAY V. McKAY.

Covenant—Right to convey—Reformation of deed.

To an action against defendant as administratrix of one J. McKay, for breach of covenant by the said J. McK., that he had the

right to convey certain lands to the plaintiff, the defendant pleaded on equitable grounds that the real contract between the said J. McK., the plaintiff, was that the said J. McK. should execute a deed under the Act respecting Short Forms of Conveyances, and containing covenants against his own acts only, but by mistake the document was made general, and asked that the deed might be reformed.

Held, that upon the evidence set out in the case, the plea was proved, and the deed was accordingly directed to be reformed.

McBeth, for the plaintiff.

R. M. Meredith, for the defendant.

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PARSONS, qui tam v. CRABE.

Magistrate—Costs—Overcharge—Liability.

A magistrate, acting under 32 & 33 Vict. c. 20, sec. 37 D., convicted some four persons for disturbing an assemblage of persons, &c., but instead of imposing the costs, which would appear to be about \$9.25, on all the defendants, he separately imposed a fine of \$6.00 on each defendant.

Held, under the circumstances, there was a wilful overcharge, and the magistrate was liable to the penalty imposed in such cases.

Bethune, Q. C., for the plaintiff.

Ferguson, Q. C., for the defendant.

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MOLSON'S BANK v. CORPORATION OF BROCKVILLE.

Municipal corporations—Fraudulent act of officer—Benefit to corporation—Liability.

On the 28th August, 1879, the defendant's bank account at the Bank of Montreal was overdrawn to the extent of \$1157 64, and a resolution of the council was thereupon passed, authorizing the mayor and town clerk to borrow from some banking institution a sum not exceeding \$2,000, to meet the current liabilities until the taxes were available, and to sign the necessary documents and affix the corporate seal. The resolution appeared in the town newspapers. On 2nd September, a promissory note for \$2,000, in accordance with the terms of the resolution was made and discounted at the

Bank of Montreal, and the proceeds placed to the defendants' credit. On the 5th September, a similar note was made and discounted at the plaintiff's bank, where the defendants had kept an account, but which was virtually discontinued, but there was a small balance remaining to the defendants' credit. The last note was, in fact, fraudulently procured, to be made and discounted by one T., who was the clerk and treasurer of the defendants, and who was a defaulter, and as such treasurer he chequed out some \$1,656 of this money, which he deposited to the credit of the defendants, at the Bank of Montreal, and the defendants derived the benefit thereof.

Held, that the defendants were liable to the plaintiffs for the \$1,656, for that T. had acted within the scope of his authority, and defendants derived the benefit thereof.

Britton, Q. C., and *Wood*, for the plaintiffs.

Richards, Q. C., and *Fraser*, for the defendants.

—
WATTS v. ATLANTIC MUTUAL LIFE INS. CO.

Insurance—Equitable non-forfeiture system—Promissory note.

Action on a life insurance policy for \$1,000, on the joint lives of the plaintiff and his wife, on what is called the equitable non-forfeitable system, whereby, if after the payment of one or more annual premiums, the policies were allowed to lapse, the insurance was continued in force for the period which the equitable value of the policy at the time of lapse would purchase. The policy was effected on the 13th April, 1869, and the quarterly payments of cash premiums were made up to the 13th October, 1873, being a period of four years and nine months, so that under the defendants' tables the equitable value of the policy was such as to continue it in force for three years and 318 days, during which period the death of one of the insured, the wife, occurred. After the plaintiff had ceased to make the said cash payments, the defendants' agent, of his own authority, made an arrangement with the plaintiff whereby the plaintiff, on 28th January, 1875, gave a so-called promissory

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note for the four quarterly payments of 1874, by the terms of which the policy was to be null and void if the note was not paid at maturity.

Held, under the circumstances more fully set out in the case, that the plaintiff was entitled to recover the amount of the policy, the death of one of the joint lives having occurred during the extended period; and that the non-payment of the note could not be taken advantage of so as to wholly deprive the plaintiff of such right of recovery, but its effect was merely to place the plaintiff in the same position as if the note had not been given.

F. E. Hodgins, for the plaintiff.

McCarthy, Q. C., for the defendants.

VACATION COURT.

Oaler, J.]

[June 8.]

ARMOUR v. ROGERS.

Husband and wife—Tort of wife—Whether husband a proper party to action.

Held, that in action for a tort committed by a wife during coverture, the husband is not a proper party, but the wife must be sued alone.

Ogden, for the plaintiff.

Creelman, for the defendant.

TORONTO HOSPITAL TRUSTEES v. DENHAM.

Ejectment—Lease of land—Sale of buildings thereon—Ejectment for breach of covenant not to assign, &c.—Recovery limited to land, and not to include buildings.

The plaintiffs, the owners in fee of certain lands on which certain buildings, &c., were erected, by an indenture of lease, dated 30th October, 1876, leased it for 21 years to one B. The lease contained the covenants to pay rent and not to assign or sublet without leave, with a proviso for re-entry on non-payment of rent, or non-performance of covenants. By a deed, of this same date, which after reciting the preceding lease, and an agreement of B. to purchase the buildings, &c., in and upon the said lands and premises, the plaintiffs for the consideration of \$1,400, conveyed to B. the said

buildings, &c. B. then gave a mortgage of the land to J. H. & E. H. Afterwards B. assigned the lease to C.; C. assigned to G. H. H., and G. H. H. assigned to M. This last assignment was without the plaintiffs' consent. The plaintiffs thereupon brought ejectment against the defendant, who was in possession of the buildings, &c., under a lease thereof from B., for the forfeiture occasioned by the said assignment, as also for non-payment of rent. The plaintiffs obtained a verdict. Subsequent thereto, and after motion in term, the plaintiffs obtained a decree in Chancery, upon bill and answer, to which the now plaintiffs were plaintiffs, and G. H. H., J. H., E. H., and M., were defendants, by which the deed from the plaintiffs to B., so far as it conveyed the land on which the buildings stood was a mistake, and the deed should be rectified so as to pass only a chattel interest in said buildings, &c., and no estate whatever in the land.

Held, that the plaintiffs were entitled to retain their verdict; but, under the circumstances, their recovery must be limited to the land alone, and would not include the buildings, &c., thereon; and, therefore, that they could not enter in said buildings, &c., or remove the defendant therefrom.

H. Gamble, for the defendant.

Foster, for the defendant.

SELECTIONS.

OWNERSHIP OF LANDS USQUE AD MEDIUM FILUM.

A question of more than ordinary novelty was raised in the case of *Leigh v. Jack*, 42 L. T. Rep. N. S. 463, which came before the Court of Appeal on appeal from the Exchequer Division. The question there raised was, whether the presumption of law that the property in the soil of a road belongs *usque ad medium filum viae* to the adjoining proprietors arises before the road has been dedicated to the public by being used as a highway. The action was brought to recover a piece of waste land in the borough of Liverpool, which was in the occupation of the defendant. The plaintiff was tenant for life under the will of

OWNERSHIP OF LANDS USQUE AD MEDIUM FILUM.

J. L., deceased, of all the lands of which J. L. died seized. In 1854 J. L. was seized of a piece of land adjoining the south side of a part of the piece of waste land, and called Grundy Street. By deed dated the 1st Dec., 1854, he conveyed to the defendant the latter piece of land in fee, subject to a ground rent secured by powers of distress and re-entry. The land conveyed did not include any portion of the site of Grundy Street. On the 19th March, 1857, J. L. by deed conveyed to the Mersey Dock Trustees a piece of land adjoining the north end of the waste land called Grundy Street, but no portion of the site of Grundy Street was conveyed. The last piece of land was subsequently conveyed by those trustees to the defendant. The first mentioned piece of waste land is bounded on the east by waste land called Napier Place; but neither Napier place nor Grundy Street was ever used by the public as a highway. In 1872 the defendant completely inclosed the pieces of land called Grundy street and Napier Place. No complaint was made by the plaintiff or her predecessors until 1875. Judgment was given by the Exchequer Division for the plaintiff. On appeal it was argued that the street had been defined on the plans, and as clearly as it could be in the conveyance; and that the grantor could not derogate from his own grant.

Where the claim to the soil of a road or the bed of a stream is founded upon a presumption arising from a grant of the adjacent land, the words in the instrument of grant are to be taken in the sense in which the common usage of mankind has applied to them in reference to the context in which they are found. If lands granted are described as bounded by a house, no one could suppose the house to be included in the grant; but if land granted is described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right of the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable. Hence it can never be a question to be determined by the literal meaning of the words without reference to the circumstances in which they are

used. The general rule is, that a grant of land bounded by a highway or river carries the fee on the highway or the river to the centre of it, provided the grantor at the time owned to the centre, and there are no words or specific description to show a contrary intent: per Cur., *Lord v. Commissioners for City of Sydney*, 12 Moo. P. C. 97.

An instance of such an intention, i. e. of an intention not to pass the adjacent soil, is found in the case of *Marquis of Salisbury v. Great Northern Railway Company* (inf.), as well as in the recent case of *Plumstead Board of Works v. British Land Company*, 31 L. T. Rep. N. S. 752. In the latter case, the defendants being owners of certain lands, in 1863 laid them out for building purposes, and made roads and ways across them. Nearly the whole of the estate was sold in lots to different purchasers, and conveyed to them by bounds set out in coloured plans. Each lot conveyed was numbered, and had a frontage upon one of the roads, and was stated in the conveyance to be on the side of the road and adjoining thereto. The road was not included in the admeasurements or colouring. The roads had been dedicated to the public, but no proceedings had been taken to make them repairable by the parish. The Court of Queen's Bench held upon those facts that it was intended by the form of conveyance used that no part of the soil of the road should pass from the defendants to the purchasers of the lots.

The conveyance in *Simpson v. Dendy*, 8 C. B. N. S. 433, was by the lord of part of the demesne of the manor. The land was described "all that piece or parcel of meadow ground commonly called or known by the name or description of Chamberlain Field, containing by estimation 3a. 3r. 35p., be the same more or less, and abutting toward the west on Hall Lane." The deed also contained the following general words: "Together with all ways, etc., and appurtenances to the said messuage, etc., lands, etc., belonging, or therewith used, possessed, occupied, or enjoyed, or accepted, reputed, taken, or known as a part, parcel, or member thereof, or as appurtenant or belonging thereto." Upon

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a special case, in which it was provided that the court should be at liberty to draw inference as a jury, it appeared that the grantee of the above field and those claiming under him had for sixty years used a small strip of land lying between the field and Hall Lane as a place of deposit for manure; that about the year 1841 the present owner cut and converted to his own use a tree which grew thereon, and that in 1843 he inclosed the strip. On the other hand there was evidence that the lord of the manor had both before and since the date of the conveyance exercised various acts of ownership by making grants thereof, and giving to the owners of the adjoining lands license to inclose over other similar trips of land by the roadside, in other parts of the manor, the nearest of which was about three-quarters of a mile distant from the spot in question. The question for the court was, whether the conveyance of the field was sufficient to pass to the grantee the strip of land beyond the fence, and the soil to the centre of Hall Lane adjoining. Mr. Justice Willis was of opinion that a conveyance of land described as abutting on a road passes a moiety of the soil of the road unless there was something in the context to exclude the presumption. His Lordship thought it was like the case put in Rolfe's Abr. "Graunts" (P.) pl. 6: "*Si home grant un messuage vocatum Falstolfe Place prout undequc includitur acquis per ceux parolls le soile del motes en que le live est passera.*" The court came to the conclusion that the presumption in favour of the plaintiff, the grantee, should prevail.

The principle was not disputed in the *Marquis of Salisbury v. Great Northern Railway Company*, 5 C. B. N. S. 174, that in ordinary cases where a man who is the owner of two pieces of land conveys them to a purchaser, if a turnpike road lies between them, the soil of the road passes by the conveyance, although the conveyance is silent as to its existence, and although the particular measurement of each piece is given and would exclude the road. It appeared in that case that the Great Northern Railway Company had in 1848 purchased of the plaintiff certain freehold land ad-

joining a turnpike road to be used partly for the site of their railway and works, and partly for the purpose of diverting a portion of an existing road. Having made a substituted road, the company, with the knowledge of the plaintiff and of the trustees, inclosed and took possession of the portions of the old road which had ceased by the diversion to form part of the turnpike road. The soil was not noticed in the conveyance, all parties being under the impression that it was vested in the trustees. By several acts regulating the turnpike road, the trustees had power from time to time, to purchase land for the widening of the road; but there was no evidence that the freehold of the diverted portion of the road had ever been acquired by them. The Court of Common Pleas held upon those facts, in an action of ejectment in which the plaintiff claimed to be entitled to possession of the site of the old road, that the presumption that the soil of the road was in the plaintiff as owner of the adjoining land, was not rebutted by the local Turnpike Acts, so as to cast upon the plaintiff the onus of showing that the soil of the road had not been purchased by the trustees, and that the soil of the old road did not pass by the conveyance to the defendant company. It was argued for the plaintiff that the deed of conveyance did not contemplate any dealing with the soil of the road, and that, as this was not the case of a voluntary bargain, but a compulsory sale under the powers of a railway company, no presumption was raised in favour of the purchasers. Mr. Justice Crowder, during the argument, raised the question whether, if the conveyance had been an ordinary one of two pieces of land intersected by a road, it would not pass the soil. The point was not necessary for the decision and was not settled.

Chief Justice Cockburn pointed out during the argument in *Leigh v. Jack*, that the maxim that the grantor could not derogate from his own grant did not arise here. True, having laid out this waste land as a street, the grantor could not derogate from his grant by building upon it, but that was not the question. "I think," said his lordship, "that the

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ordinary presumption of law that the ownership of the soil *usque ad medium filum viæ* is to be taken to be in the land-owners on either side does not apply here. This presumption of law is founded on the probability that, where the ownership of the soil of a road is doubtful, it belongs to the adjoining proprietors; because when land was withdrawn from its private uses, and granted to the public for the purpose of making a road, it is reasonable to suppose that something was given up on each side." "Now," said Lord Justice Bramwell, "if a man says: 'I hereby sell you my estate at A, bounded by such and such roads,' then the land *usque ad medium filum viæ* will pass; or suppose what he sells is 'my field of Dale,' and there is a road on one side of it, then the land *usque ad medium filum viæ* would pass; or suppose he gave the particular boundaries of the field such as 'bounded by a hedge,' and there was a road beyond the hedge, then the land *usque ad medium filum viæ* would pass, because a man does not convey less than he has, and in such a case he means bounded by the road." That in his Lordship's opinion was the principle of the cases. If the conveyance included the street, the defendant might have prevented the making of the road. Of the same opinion was Lord Justice Cotton. The decision practically comes to this, that the rule relating to land *usque ad medium filum viæ* can have no application where there is no *via* in existence at the time of the grant.—*Law Times*.

CONTRACTS IN RESTRAINT OF TRADE.

Contracts in restraint of trade have received their latest illustration in the case of *Roussillon v. Roussillon*, which was recently decided by Mr. Justice Fry. The plaintiffs, who are champagne merchants at Epernay, and have a place of business in London, applied for an injunction to restrain the defendant from carrying on a rival trade. The defendant went into the employment of the plaintiffs at Epernay in 1866. He remained there two years, and was afterwards employed by them as a traveller in England and Scotland. In 1869, in

return for the kindness bestowed upon him by the plaintiffs, and for the trouble they had taken in his commercial education, he undertook not to represent any other champagne house for two years after leaving their service. He also undertook, if at any time he left the plaintiffs' house for any reason whatever, not to establish himself nor to associate himself with any other persons or houses in the champagne trade for ten years. The defendant left the plaintiffs' employment in 1877, and the defendant established himself in London as a vendor of Ay champagne. Proceedings were instituted in the Tribunal of Commerce at Epernay by the plaintiffs, who obtained judgment by default. The defendant was thereby restrained from representing any champagne house for two years, and from carrying on the business of champagne merchant for ten years. The present proceedings were brought to enforce either the contract or the judgment. Two questions were thus raised. His Lordship was of opinion that the rule to be deduced from the authorities was, that the restraint must not be unreasonable, having regard to the circumstances of the business to be protected. He thought the restraint in this case was not larger than the reasonable protection of the plaintiffs' business warranted. Must the contract, then, be partial to one place? Such a rule, in his opinion, could be evaded by exception. There were businesses, considering the facilities of communication, which were very well conducted over the whole country or a larger area, and other businesses which could only be interfered with in a limited area. "In the first case," his Lordship went on to say, "a universal restriction would be reasonable; in the second, it would be unreasonable to render the contract void. * * The supposed rule as to locality would only apply to those cases in which, in my judgment, it ought not to apply; and therefore, unless there is strong authority to bind me, I should hold that there was no such rule." In the recent case of *Collins v. Locke*, 41 L. T. Rep. N. S. 292, it appears to have been fully admitted by the Privy Council that contracts in restraint of trade are against public policy, unless the restraint they impose is partial only, and they are made for good consideration and

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are reasonable. The main consideration, however, appears to be whether the restraint is larger than the necessary protection of the party with whom the contract is made, is unreasonable and void, as being injurious to the interests of the public on the grounds of public policy. In the *Leather Cloth Company v. Lorrison*, L. Rep. 7 Eq. 355, Vice-Chancellor James stated that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. His Lordship explained that the same public policy which enables a man to sell what he has in the best market, enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract. Restrictions even indefinite in time have been held valid, as in *Bunn v. Guy*, 4 East, 190, or for a life of the party restrained, as in *Hitchcock v. Coker*, 6 A. & E. 438. Again, Vice-Chancellor Leach, in *Bryson v. Whitehead*, 1 S. & S. 74, enforced an agreement by a trader upon selling a secret in his trade to restrain himself for twenty years absolutely from the use of such secret, and intimated that the trader might restrain himself generally. Mr. Justice Fry, relying upon the *Leather Cloth Company v. Lorrison* and other cases, came to the conclusion that the plaintiffs had established a right to an injunction.

—*Law Times*.

THE LAW OF TRADE MARKS.

Scarcely a week passes during the legal year without some addition being made to the authorities upon the Law of Trade Marks. In a case which was heard on the 24th instant, on appeal from the Master of the Rolls (*Re Worthington's Trade Mark*), the question for decision was whether certain brewers were entitled to register a trade-mark which consisted of a triangle with the picture of a church inside, and the name and address of the firm around it. One of the well-known brewery firms had already adopted a triangle of a different colour and without the picture inside. Was the former

mark so like the latter that it was "calculated to deceive" within the meaning of the Trade Marks Registration Act? The Master of the Rolls decided the question in the affirmative. He thought that, if the applicants were allowed to register the proposed mark, they might subsequently colour it red, the colour of the trade mark already registered, so as to obscure the church, and that the proposed mark was in fact an unfair attempt to gain advantage by adopting a mark as nearly as possible resembling the other. Registration was accordingly refused. On appeal this decision was upheld by Lords Justices James, Brett and Cotton. What is the object of the Trade Marks Registration Act? In the words of Lord Justice James, it is to prevent the mischief arising from one trader adopting a similar mark to that already used by another trader. His Lordship admitted that, if the marks were used in black and white only, there would be a substantial difference between them. The Act, however, founded no distinction upon differences of colour. Hence, if the appellants' marks were registered, there would be nothing to prevent them from adopting a red colour. Lord Justice Brett thought there were two questions—one of law, the other of fact, the former being whether, in construing the Act, the marks were to be looked at only as printed in the advertisements, or as they would probably be used in the trade. Nothing was said in its provisions about outline, form, or design. The thing to be registered was stated to be "a distinctive device, mark, heading, label or ticket." "That being so," said his Lordship, "and the mischief being one which was to be done in the course of the trade, it would be a narrow construction to say that you were only to look at the mark as printed in the advertisements, and not as it would be used in the trade. There is nothing in the Act to prevent a trade-mark from being used in any colour. In registering a trade-mark, not only the outline or design as registered will be protected, but the trade-mark which can be used in the trade." The question then was resolved into this: assuming both trade-marks to be registered, and the owner of

THE LAW OF TRADE MARKS—RETROSPECTIVE STATUTES.

each to be ignorant of the other, would any fair use of either be calculated to deceive, both being of the same colour? This raised the question of fact, which was answered in the affirmative. The Lords Justices, however, were not altogether unanimous, for Lord Justice Cotton entertained great doubts as to the decision of the Master of the Rolls. Speaking for himself, he was of opinion that there was sufficient difference between the two marks and distinctness of device to prevent the Court from arriving at the conclusion that the proposed mark was so similar to that already registered as to be calculated to deceive. This difference of opinion was, it will be noticed, really upon a question of fact. It had no influence upon the result of the case.

—*Law Times.*

RETROSPECTIVE STATUTES,

May they validate prior void contracts; and as a consequence render invalid intermediate valid contracts made by one of the parties with others: So held by Judge Moran.

In the case of *J. Y. Scammon v. The Commercial Union Insurance Company*, in the Circuit Court, before Judge Moran, a verdict was rendered in favour of the defendant. It seems that on the 9th day of July, 1872, Scammon borrowed \$220,000 in gold from the United States Mortgage Company, and secured it by mortgage on No. 409 Michigan Avenue and other adjoining property. He made default in payment of interest in December, 1873, but in January took out \$20,000 insurance on No. 209 Michigan Avenue. In February, 1874, the Company declared the whole loan due, and advertised the property for sale under a power to sell contained in the mortgage. The property was sold thereunder March 31, 1874, and struck off to J. H. Rees for \$100,000, and he conveyed to Mr. Babcock individually, he being at the time president of the Mortgage Company. Scammon, however, did not surrender possession of the property, but remained in actual possession, claiming title, until the fire of July, 1874, when the buildings were destroyed. Failing to get the insurance on the property, he

began a suit against the Commercial Union Assurance Company, one of the insurers, claiming the foreclosure proceedings were void because the Mortgage Company was a foreign corporation, and prohibited from loaning money or taking securities in Illinois, at any time between July, 1872, and the time when the property was destroyed by fire, and that hence he had not then parted with the title to the property, but had the same interest in it as when he got it insured.

The Insurance Company, on the contrary, claimed that the subsequent Act of April, 1875, in terms validated prior mortgages between July, 1872 and 1875, and operated in favour of the Mortgage Company so as to make good the mortgage in question from the time it was given, and, as a consequence, that it validated the foreclosure proceeding which had taken place before the fire, and by relation back divested Scammon's title out of him, as of the time when the attempted foreclosure was made some months before the fire. On this question the judge held for the defendants, and instructed the jury to find in their favour, which was done. Mr. Scammon took an appeal.—*Chicago Legal News.*

CANADA REPORTS.

ONTARIO.

COUNTY COURT CASE.

REGINA V. SEATON.

Liquor License Act—Rev. Stat. Ont. cap 181, sec. 28.

[London, July 13, 1880.]

On the 29th of April, 1880, a tavern license was issued to W. D. Campbell, to be in force from the 1st of May, 1880, to the 30th April, 1881, for the hotel known as the Western Hotel, in Strathroy. On the 3rd day of June last, Campbell removed from the hotel, gave possession to Seaton, and assigned the license to him. On the 10th, Seaton, at the suggestion of the Chairman of the Board of License Commissioners, paid into the Bank of Commerce \$7.00, the transfer fee, to the credit of the License

Co. Ct.]

REGINA V. SEATON.

[Co. Ct.]

Fund for the License District of West Middlesex. On the 11th, an information was laid before the Police Magistrate against Seaton by the Chief of Police for selling liquor on the 9th day of June without license. On the 17th, the hotel was inspected by the License Inspector and the usual certificate given. On the 25th of June, Seaton was convicted for selling liquor contrary to law on the 9th, and fined \$20 and costs. From this conviction Seaton appealed.

Meredith, Q.C., for the appellant, contended that the appellant, under the 28th section, chap. 181 of the Revised Statutes of Ontario, had one month after the assignment of the license to obtain the consent of the Commissioners; in the meantime he could sell.

Hutchison, contra.

ELLIOTT, Co. J.—One Campbell held a tavern license, and transferred it to the appellant on the 3rd of June, 1880. The appellant, apparently relying upon this transfer, sold liquor in the same tavern on June 9th, 1880, for which he has been convicted, on the ground that he had no license for so doing, and against this conviction he has appealed.

According to sub-section 2 of the 28th section, cap. 181, R. S. O., the transferor of a license shall first produce to the License Commissioners a report of the Inspector of Licenses, setting forth facts similar to those which are required by the 9th section. When this report has been obtained from the inspector, the next step to be taken is to produce the written consent of the Commissioners, according to section 28.

Now, the Inspector's report was not obtained until the 17th of June, whereas the sale was on the 9th of June; whether the written consent of the Commissioners was ever obtained seems from the depositions to be not very clear; but certainly it was not obtained until after the 9th of June. It seems, therefore, to be clear that the appellant, when he sold liquor on the 9th of June, had nothing to qualify him to do so, except the bare fact of the transfer of Campbell's license to sell. Was this a sufficient authority? By the appellant it is contended it was upon the ground that by the

28th section he had one month in which to complete the things which are required to be done by that section, and that the sale for which he was convicted took place within that period. I cannot accede to this view of the law. I think the meaning of section 28 is that if the transferee of the license does not procure the formalities required by that section to be done, within one month after the assignment, then the license *ipso facto* becomes void. But this does not dispense with the necessity there is, that the transferee should first have these formalities performed. The Statutes state that any one selling liquor should be licensed. The 9th section requires that applicants for licenses shall be fit and proper persons to have licenses, and in case of tavern licenses, shall have all the accommodation required by law. And by the 19th section every tavern shall contain suitable bedding and furniture. This shows the importance that should be attached to the Inspector's Report, and to the written consent of the Commissioners. If the transferee of a License can go on and sell liquors without either the Inspector's Report or the Commissioners' written consent, then he may do so for a month at least however unsuitable he may be in respect to character, or however destitute his house may be of the requisite beds and bedding, furniture and accommodation required by the 9th and 19th sections. In fact he may go on and sell during a month although the bar-room should be the only furnished apartment in the house.

In this case Campbell removed all his furniture, which was replaced by the appellant, and I believe properly replaced. But I am looking at what might have occurred if the condition of the law were such as the appellant contended for. It is said that this conviction is a harsh one, and that the appellant has not wilfully contravened the law. I give no opinion upon this point—upon this appeal I consider I have only to deal with the case in its legal aspect, and in that view, I feel myself constrained to adjudge that this appeal should be dismissed.

Appeal dismissed with costs.

Div. Ct.]

BANK OF OTTAWA V. SMITH, &C.—CORRESPONDENCE.

DIVISION COURT CASES.**COUNTY OF CARLETON.****BANK OF OTTAWA V. SMITH AND MARSHALL.***Division Courts—Action against bailiff and surety for not returning execution.*

Declaration in covenant against defendant Smith, as Bailiff of the 4th Division Court of the County of Carleton, and his surety, Marshall, under section 221, Division Court Acts, for non-return of execution within three days after return day and also for false return.

Demurrer on the ground that the declaration did not state that the Bailiff's fees were paid at the time of the issuing of the execution.

Summons to show cause why demurrer should not be set aside and judgment as for want of a plea.

Mosgrave showed cause, and contended that section 51 of the Division Court Acts made the payment of fees a condition precedent, and that unless this payment were made, the Bailiff was not obliged to make a return.

McCaul, for the rule, contended that the Bailiff had a right to demand that his fee should be paid to the Clerk at the time the execution was given to him, but if he did not do so, and accepted the execution, he and his sureties were liable, under section 221, to an action on their bond, where he made a false return of the execution, or did not return it within three days after the return day thereof.

LYON, J. J., set the demurrer aside with costs.

CORRESPONDENCE.*Interest after maturity of debt.**To the Editor of the LAW JOURNAL.*

SIR,—There has been a good deal of discussion among the profession on the vexed question of interest when the agreement or security is silent as to the rate after the maturity of the debt.

Cook v. Fowler, L. R. 7 H. L. 27, indicated the true principle to be that interest on the maturity of the debt and in the absence

of any agreement as to the rate after such maturity, sounds in damages only; and if the rate before the maturity of the debt was unreasonable, it was inferred that the parties saw fit to make no agreement respecting the rate of interest after such maturity, and consequently only statutory interest could be collected. But it is impliedly stated that if the interest were not unreasonable, perhaps the result of the case might have been different. The case of *Dally v. Humphries*, 37 U. C. Q. B. 514, goes no further. The writer, however, is informed that in all computations in the Masters' offices and by officers in the Common Law Courts the practice now is to allow only the statutory interest in all cases where the instrument or agreement is silent as to the rate of interest after the debt becomes payable.

The judgment of Cotton J., in the recent case of *Goodchap v. Roberts*, L. R. 14 Chy. Div. 49, seems to question the application of this principle in cases of redemption (and we may infer the same rule would apply in foreclosure suits).

Apparently in such suits if the interest stipulated were the usual rates paid by mortgagors, and the mortgagor had gone on paying interest which the mortgagee had applied on his interest at the rate stipulated by the mortgage, but without any express sanction of the mortgagor, the mortgage in question could only be redeemed on paying the larger interest.

A. B.

To the Editor of THE LAW JOURNAL.

DEAR SIR,—I enclose you, as a curiosity, the enclosed *modest* crying-up of one's wares :—

PORT COLBORNE,

Notary Public, Commissioner for taking Affidavits, &c.

Have you a Deed or Mortgage to Draw?

Do you wish to make a Will or Lease?

Would you enter into an Agreement, Bond or a Contract?

Or do you desire to have a Business Letter carefully written?

Call on the undersigned, and he will do the writing carefully, neatly and cheaply.

Fire and Life Insurance effected.

Money to loan on Real Estate.

Ocean tickets, good from Port Colborne to any European city.

AUTUMN CIRCUITS.

Fortunately for the good of the community at large in this section, professional gentlemen invariably prepare conveyances, and these pests only occasionally get a nibble, and not unfrequently we have the extreme pleasure, especially in the case of chattel mortgages, of bringing their work to naught.

Yours respectfully,

SUBSCRIBER.

St. Catharines, June 14, 1880.

AUTUMN CIRCUITS, 1880.

EASTERN CIRCUIT.

Hon. The CHIEF JUSTICE of the Queen's Bench.

1. Pembroke.....Monday.....13th Sept.
2. Perth.....Monday.....20th "
3. Cornwall.....Monday.....27th "
4. L'Orignal.....Wednesday.....13th Oct.
5. Ottawa.....Monday.....18th "

MIDLAND CIRCUIT.

Hon. Mr. Justice BURTON.

1. Belleville.....Monday.....27th Sept.
2. Napanee.....Tuesday.....12th Oct.
3. Picton.....Monday.....18th "
4. Kingston.....Thursday.....21st "
5. Brockville.....Tuesday.....2nd Nov.

VICTORIA CIRCUIT.

Hon. Mr. Justice PATTERSON.

1. Cobourg.....Monday.....27th Sept.
2. Lindsay.....Thursday.....7th Oct.
3. Peterborough..Monday.....18th "
4. Whitby.....Monday.....25th "
5. Brampton.....Monday.....1st Nov.

BROCK CIRCUIT.

Hon. Mr. Justice CAMERON.

1. Owen Sound...Monday.....20th Sept.
2. Walkerton...Monday.....27th "
3. Goderich.....Monday.....4th Oct.
4. Stratford.....Monday.....11th "
5. Woodstock....Monday.....18th "

NIAGARA CIRCUIT.

Hon. The CHIEF JUSTICE of the Common Pleas.

1. Milton.....Monday.....20th Sept.
2. Welland.....Monday.....27th "
3. Cayuga.....Monday.....4th Oct.
4. St. Catharines.Mondays.....11th "
5. Hamilton.....Monday.....25th "

WATERLOO CIRCUIT.

Hon. Mr. Justice OSLER.

1. Guelph.....Monday.....13th Sept.
2. Berlin.....Monday.....27th "
2. Brantford.....Monday.....4th Oct.
4. Simcoe.....Monday.....11th "
5. Barrie.....Monday.....18th "

WESTERN CIRCUIT.

Hon. Mr. Justice ARMOUR.

1. London.....Tuesday.....28th Sept.
2. St. Thomas....Tuesday.....12th Oct.
3. Chatham.....Tuesday.....19th "
4. Sandwich.....Tuesday.....26th "
5. Sarnia.....Tuesday.....2nd Nov.

HOME CIRCUIT.

Hon. Mr. Justice MORRISON.

1. Toronto (Assize } Tuesday.....28th Sept.
and Nisi Prius) }
2. Toronto (Oyer & } Tuesday.....26th Oct.
Terminer, &c.) }

N. B.—There shall be at every Nisi Prius Court a Jury List and a Non-Jury List. The former shall be first disposed of, and the latter not taken till after the dismissal of the Jury Panel, unless otherwise ordered by the Judge.

The Hon. Mr. Justice GALT will remain in Toronto during the Autumn Circuit, to hold the sittings of the Queen's Bench and Common Pleas, each week, and for the transaction of business by a Judge in Chambers.

CHANCERY AUTUMN CIRCUIT.

The Hon. VICE-CHANCELLOR BLAKE.

Toronto Tuesday.... 2nd November.

HOME CIRCUIT.

The Hon. The CHANCELLOR.

- Guelph..... Tuesday.... 5th October.
- Brantford... Tuesday.... 12th "
- Simcoe..... Friday..... 15th "
- St. Catharines Thursday... 21st "
- Barrie..... Monday.... 15th November.
- Owen Sound. Tuesday.... 23rd "
- Whitby..... Friday.... 26th "
- Hamilton... Wednesday.. 1st December.

CHANCERY ANNOUNCEMENTS—FLOTSAM AND JETSAM.

WESTERN CIRCUIT.

The Hon. VICE-CHANCELLOR BLAKE.

Stratford....	Wednesday..	8th September.
Goderich....	Tuesday....	14th "
Sandwich... ..	Monday....	20th "
Chatham.....	Thursday....	23rd "
Woodstock..	Thursday....	30th "
Walkerton... ..	Tuesday....	5th October.
St. Thomas..	Friday.....	8th "
London.....	Tuesday....	12th "

EASTERN CIRCUIT.

The Hon. VICE-CHANCELLOR PROUDFOOT,

Cornwall....	Tuesday....	14th September.
Ottawa.....	Saturday....	18th "
Brockville..	Monday....	27th "
Kingston....	Thursday....	30th "
Lindsay....	Monday....	25th October.
Peterborough	Thursday....	28th "
Cobourg....	Tuesday....	2nd November.
Belleville... ..	Monday....	8th "

COURT OF CHANCERY.

ANNOUNCEMENTS.

The Sittings of the Full Court appointed by the General Orders to be held on the 26th August next for the re-hearing of causes are adjourned until Thursday, 2nd September next. Between the 21st August and 1st September the Court will not sit for the hearing of any causes or applications except such as may be disposed of in vacation. The Master's office will be open each day (Sundays excepted) from 10 to 12 a.m. for the purpose of making appointments. The other offices will be open during the same hour for the transaction of such business as shall not require the attendance of the opposite party, and as may be transacted in vacation.

During vacation applications of an urgent nature are to be made to V. C. Proudfoot. He will be at Osgoode Hall at 11 a.m. on each Tuesday. Papers relating to applications are to be left with the Registrar on the previous Friday. Applications for leave to serve notice of motion may be made to the Registrar at his office at 10 a.m.

In any case of urgency the brief of counsel is to be sent to the Vice-Chancellor, accompanied by copies of the affidavits in support of the application, and also by a minute on a separate sheet of paper signed by counsel of the order he may consider the applicant entitled to, and an envelope capable of securing the papers addressed as follows:—

"To the Registrar of the Court of Chancery
Osgoode Hall,
Toronto."

(Vacation business.)

and containing stamps for postage. On application for injunction or writs of *ne exeat provincia*, in addition to the above, there must also be sent an office copy of the bill.

The papers sent to the Vice-Chancellor will be returned to the Registrar's office. The Vice-Chancellor's address can be obtained on application at the Registrar's office.

Cheques will be issued by the Accountant of the Court of Chancery on Friday next at 2 to 4 p.m.

FLOTSAM AND JETSAM.

The following forecast of the fortunes of Ex-President Grant, which is quite as good and veracious a prediction in its way as many ancient oracles, and more modern prophecies, may be found in the Index to the first volume of the Probate and Divorce Reports, published 31st December, 1869, p. 786:

"GENERAL GRANT—Limited Administration."

"Do you understand the nature and solemnity of an oath?" the judge asked a witness who had come up from the lower end of the State. "Well, yes," the witness replied, after some study. "I reckon I know the natur' of an oath, but there never appeared to be no powerful amount of solemnness about swearin' to me. It always come kind of nat'ral like. Mam swore a little when she was riled, dad was a born cusser, and Parson Bedloe—" But the court excused him without further pedigree.

GEORGE JONES, *alias* the Count Joannes, an eccentric individual who died in New York last week, was both an actor and a lawyer. In an election case before Judge Brady, of that State, some years ago, after considerable debate between the lawyers, the judge himself interposed with: "Well, gentlemen, let us get to the merits of the case. I suppose that all that either party desires in this case is an honest count." At which there rose before the judge on the instant a wild and strange figure, not unfamiliar to the courts, nor yet to the footlights, which with hand upon its heart bowed low and uttered in sepulchral tones: "May it please the court, *Eccce homo!*" It was the Count Joannes.

The following is from California. Scene in a police court. Judge—"Bill Sheets, you are charged with burglary. Are you guilty?" "Sure, yer 'onour, an' if it's gooilthy I am, do yez thinks I be afther tellin' yez ov it? I pleads not gooilthy," was the response of Bill. "All right," said the judge, and turning to one of the most eminent members of the bar, said: "You

FLOTHAM AND JETRAM.

will please act as counsel for the defendant." At this the prisoner turned and calmly surveyed the placid countenance of his champion, and then addressed the court as follows: "Sure, an' if it's that yer after givin' me fur a loiyer, I pleads gooldthy, and be done with it at once." Then as he turned and pointed to the robust form of a youthful member of the bar, he continued: "But if yoill give me him, as what is a foine loiyer, oill plade not gooldthy." The prisoner was allowed his choice of counsel.

The following remarkable title appeared in an answer filed in a New York court last week:—Wellington Porter against Daniel Quill, Arsinio Amabile, Raphael Suckrat, Jim Libbick, Louis Somebody, Martin Jinks, Lonigo Louis, Joseph Amen, Tony Amen, Billy Lonias, Bechonce Godjohn, Junice Curio, Jim Liberto and others. It was a mechanics' lien suit, most of the defendants being Italian labourers, and it is supposed that the extraordinary production above set forth was the fruit of the prolonged struggle of a modern gang foreman with the dulcet language of the modern Roman.

In an interesting article in the *Westminster Review* for October, on England's great lawyer, Lord Brougham, the writer says that the name "Brougham" is variously pronounced, but its correct pronunciation, according to its illustrious bearer, is "Broom." At his first appearance as counsel at the Bar of the House of Lords, Lord Eldon called him "Mr. Bruffam." Indignant at being so miscalled, the offended advocate sent the chancellor a rather angry message, accompanied with a paper, on which, to insure for the future the proper and monosyllabic pronunciation of the name, were written in large round text the letters B R O O M. At the end of the argument Lord Eldon, with his usual kindness of manner towards the bar, observed: "Every authority upon the question has now been brought before us. New brooms sweep clean." We may add that the common method of pronouncing the name as "Bro-am" or "Broo-am," were equally distasteful to its bearer as Lord Eldon's "Bruffam."

TWO LAWS.—Several days ago a white man was arraigned before a coloured Justice down the country on charges of killing a man and stealing a mule.

"Wall," said the Justice, "de facs in dis case shall be weighed with carefulness, an' ef I hangs yer tain't no fault of mine."

"Judge, you have no jurisdiction only to examine me."

"Lat sorter work longs to de raigular Justice, but yer see I'se been put on as a special. A spe-

cial hez de right ter make a mouf at S'preme Court ef he chunes ter."

"Do the best for me you can, Judge."

"Dat's what I'ee gwine ter do. I've got two kinds ob law in dis court, de Arkansaw an' de Texas law. I generally gins a man de right to choose fur his sef. Now what law does yer want, de Texas or de Arkansaw?"

"I believe I'll take the Arkansas."

"Wall, in dat case I'll dismiss yer fur stealin' de mule—"

"Thank you, Judge."

"An' hang yer fur killin' de man—"

"I believe, Judge, that I'll take the Texas."

"Wall, in dat case I'll dismiss yer fur killin' de man—"

"You have a good heart, Judge."

"An' hang yer fer stealin' de mule. I'll jis take de 'casion heah ter remark dat de only difference 'tween de two laws is in de way yer state de case."

A Scotch advocate writes a pleasant letter to a New York journal concerning the peculiarities and traditions of his profession. "I find," he says, "that nothing interests an American so much as my wig. I only wish the person who thus derives amusement from the fashion had to experience its inconvenience. To begin with, they are by no means cheap. A horse-hair wig costs about \$50, and an ordinary one—they are now all made out of whalebone shavings—about \$30. They very soon get dirty, and to powder them as some men used to do, only makes one's coat perpetually greasy. Then in summer they are hot and tight on the head. Yet we all wear them. We are not compelled to do so. We must wear a gown; that is our mandate. The abolition of the gown I should regret. Its several parts involve not a little curious history. For instance we carry at the back of the gown a little pocket which, though still worn, is now sewn up. That appendage takes you back more than 300 years, to the days before the Reformation, when the advocates were churchmen. No churchman was allowed to accept a regular payment for his services. But if he was prohibited from handling the money, that was no reason why you, if you wanted your case particularly attended to, should not put a couple of gold pieces into the bag which he carried at his back. So you see we still have some relics of the past in this reforming age. Many of our names even strike a stranger as peculiar. The official head of the bar is called 'Dean of the Faculty.' 'Ah,' said Sidney Smith, when he heard the name for the first time, 'that's very odd now. With us in England our deans have no faculties!' Absurd as these old customs and names may be, it can not be denied that the country has reason to be proud of her judicial ar-

FLOTSAM AND JETSAM.

rangements, not merely in the Supreme Court, but down to the humblest judicatory."

In an article in the *Westminster Review* on the Life and Times of Lord Brougham, it is said that his first professional business in Scotland was defending prisoners free of charge, who were too poor to pay a lawyer. On the first occasion the Judge of Assize was Lord Eskgrove, whom Campbell describes as "a foolish old gentleman, of whom ludicrous stories had been told, and upon whom tricks had been played for nearly half a century." At no time in his life did Brougham care to grapple with a strong judge; but on this, his first appearance in court, he showed the propensity which ever afterwards he exhibited, to take liberties with a weak one. He accordingly perplexed Lord Eskgrove by elaborate arguments, delivered with all his vehemence and force of rhetoric, and with apparent sincerity, on such questions as whether, in an indictment for sheep-stealing, it is necessary to state the sex of the stolen animal; whether a man indicted for stealing a pair of boots can be convicted of stealing a pair of half boots; whether, where a woman made her husband drunk, and he being drunk assaulted her, the woman was not the *causa causas*, or, in the language of Scots law, *art and part*, so as to entitle the husband to the benefit of the maxim "*volenti non fit injuria*." It was not without difficulty that the prosecuting advocate convinced the not very clear-minded judge of the fallacy of Brougham's arguments, and his lordship gave this utterance to his feelings: "I declare that man Broom or Brougham is the torment of my life." The general election being over, Brougham found it necessary to turn again to the law. He became a pupil of Mr. Tindal, who was afterwards one of his juniors in the Queen's case, and subsequently Chief Justice of Common Pleas. Here he formed the acquaintance of James Parke, afterwards a Baron of the Exchequer, and Lord Wensleydale. Two men more opposite to each other than Brougham and Parke could not be found—Brougham, brilliant and ambitious, but wanting steadiness and discretion; Parke slow, plodding, cautious and persevering. With Brougham, politics, literature and science shared his energies with the law. To Parke, law was "all in all." We have heard that shortly before his death a lady said to him, "I wonder with your great mind, baron, you have never written anything." "Written anything," was the astonished answer, "why, my dear madam, I have written the judgments in the volumes of Meeson and Welsby, and they will remain long after the perishable literature of the present time has passed away."

Lord Justice Bramwell has written a strong letter condemning the Bill pending in Parliament

proposing to make masters liable to servants for injuries by fellow-servants in the course of the same employment. We have several times expressed ourselves against this. See 17 Alb. L. J. 358; 19 Id. 505. Lord Bramwell says: "I have shown that . . . it is not a natural right that the master should be liable, nor any thing that exists in the nature of things. That it is reasonable a railway company should be liable to a passenger for the negligence of its servants, because it has so contracted; and that it should not be to one of its own servants, because it has not so contracted. We are to start afresh, then, and make a new rule. Why? Why if I have two servants, A. and B., and A. injures B. and B. injures A. by negligence, should I be liable to both when, if each had injured himself, I should not be to either? There can be but one reason for it, viz., that, on the whole, looking at the interest of the public, the master, and the servants, it would be a better state of things than exists at present. Is that so?" This he answers in the negative. As the servant may now contract that the master shall be liable, so under the new law he might contract that he should not be liable, and for say sixpence a day difference of wages, he would so contract. "The great employers of labour will understand the change in the law, and guard against it. The mischief and wrong will be in the case of men, who, not knowing of the change, will go on paying the wages which include the compensation for risk, the premium of insurance, and yet find they have to pay compensation when the risk happens, and that they are insurers though they have not received the premium." His lordship concludes that change would do the workman no good except in this last class of cases. Admitting that it might make the master more careful in selecting servants, he denies that this is a sufficient consideration for the enormous increase of risk. He might add that the master is already liable for carelessness in selection, and there is therefore all the less need of making him an insurer of his servants' care toward one another. Finally, he says—"And even if the law were made obligatory in spite of bargains to the contrary, it would not profit the servant. Because it is certain there is a natural rate of wages, one fixed by what neither master nor man can control, and that if they are practically added to one way, they will be taken from in another. If a manufacturer's wages now are £10,000 in the year, and he is made to pay compensation to the amount of £1,000 a year, his wages will fall to £9,000. He cannot charge more for his produce because he has to pay more; and if he could, his sales would diminish, and injury be done to the workman in loss of work." For our own part, we regard the proposed change as so impolitic, unjust, and unequal, as to verge on folly.

LAW SOCIETY, EASTER TERM.



Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 43RD VICTORIAE.

During this Term, the following gentlemen were called to the Bar. The names are placed in the order in which they stand on the Roll of the Society, and not in the order of merit.

SAMUEL SKEFFINGTON ROBINSON.
ALEXANDER GRANT.
JOSEPH BOOMER WALKER.
EBENEZER FORSYTH BLACKIE JOHNSTONE.
FRANK FITZGERALD.
GEORGE A. F. ANDREWS.
THOMAS STEWART.
HENRY SCHUYLER LEMON.
JAMES HENDERSON SCOTT.
EUGENE DE BEAUVOIR CAREY.
GIDEON DELAHAY.
GERALD FRANCIS BROPHY.
WILLIAM HENRY DEACON.
ROBERT W. SHANNON.
DANIEL MCLEAN.
ARTHUR WILLIAM GUNDRY.
JOHN NICHOLSON MUIR.
JOHN BROWN McLAREN.

On the 19th May the following gentlemen were admitted as Students-at-Law and Articled Clerks, namely:—

Graduates.

ROBERT PEEL ECHLIN.
WILLIAM HENRY WILBERFORCE DALEY.

Matriculants.

ALEXANDER B. SHAW.
LEONARD HUGH PATTEN.

Junior Class.

DOUGLAS ALEXANDER.
PAUL KINGSTON.
THEOPHILUS BENNETT.
EDWARD W. J. OWENS.
ALBERT J. FLINT.
DONALD MACDONALD.

Articled Clerk.

WILLIAM DUNCAN SCOTT.

And on the 22nd May the following gentlemen were admitted as Students-at-Law and Articled Clerks:—

Graduates.

C. H. IVET.
CHARLES R. IRVINE.
RICHARD WALLACE ARMSTRONG.

By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

**RULES AS TO BOOKS AND SUBJECTS
FOR EXAMINATIONS, AS VARIED
IN HILARY TERM, 1880.**

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

Ovid, *Fasti*, B. I., vv. 1-300; or,
Virgil, *Aeneid*, B. II., vv. 1-317.
Arithmetic.
Euclid, Bs. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

Students-at-Law.

CLASSICS.

- 1880 { Xenophon, *Anabasis*, B. II.
Homer, *Iliad*, B. IV.
1880 { Cicero, in *Catilinam*, II., III., and IV.
Virgil, *Eclog.*, I., IV., VI., VII., IX.
Ovid, *Fasti*, B. I., vv. 1-300.
1881 { Xenophon, *Anabasis*, B. V.
Homer, *Iliad*, B. IV.
1881 { Cicero, in *Catilinam*, II., III., and IV.
Ovid, *Fasti*, B. I., vv. 1-300.
Virgil, *Aeneid*, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

DIARY—CONTENTS—EDITORIAL NOTES.

DIARY FOR SEPTEMBER.

4. Sat. ..Trinity Term ends.
5. Sun. ..Fifteenth Sunday after Trinity.
7. Tues. ..Court of Appeal sittings begin.
9. Thur. ..Sebastopol taken, 1855.
11. Sat. ..Peter Russell, President, 1796.
12. Sun. ..Sixteenth Sunday after Trinity.
13. Mon. ..Quebec taken by British under Wolfe, 1759.
14. Tues. ..Court of Appeal sittings begin. County Court sittings for York begin.
17. Fri.First Upper Canada Parliament met at Niagara, 1792.
19. Sun. ..Seventeenth Sunday after Trinity.
24. Fri. ..Guy Carleton, Lieutenant-Governor, 1766.
26. Sun. ..Eighteenth Sunday after Trinity.
27. Wed. ..Michaelmas Day.
30. Thur. ..Sir Isaac Brock, President, 1811.

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Canada Law Journal.

Toronto, September, 1880.

We understand that Mr. W. E. Hodgins, Barrister, and his brother, Mr. Frank Hodgins, are preparing and will shortly publish a complete extended index of the Revised Statutes of Ontario. We suggested some time since the desirability of such an undertaking, and are glad to hear that the want will soon be supplied. It would be convenient to have the complete index for both volumes bound up at the end of each.

As any one may be a member of Parliament now-a-days, it is of importance to know that the ancient privileges of the body are in full force. The other day Hall, V. C., held that the privilege of immunity from arrest extended to a person who has been a member of a Parliament which has been dissolved, and this extends for a period of forty days after the dissolution: *Re the Anglo-French Co-operative Association*, 28 W. R. 580

It is a trite saying that one has to go away from home for home news. Apropos of this we find in the *Solicitor's Journal*, as copied from the *London Times*, that there is, in the city of Rochester, New York, a lawyer named W. A. Gibbs, who is of the age of ninety-three years, and is still in practice. The discouraging part of the thing is, that though he has done a good amount of business, he has not become and never was rich. Small hope of wealth for those men then who knock off work at the early age of seventy or eighty.

It appears from the *Solicitors' Journal*, in the current volume, p. 586, that

EDITORIAL NOTES—IMPEACHING THE CREDIBILITY OF WITNESSES.

several gentlemen having patents appointing them Queen's Counsel, made application to the Court of Sessions, in Scotland, that their patents might be recorded "in order to give them due precedence at the bar." But the Lord President said as there was no inner and outer bar, he did not see any reason for the Court taking special cognizance of their appointment. This indicates what will, perhaps, be found to be the true view of the Queen's Counsel question, which has been so much perplexed by the deliverances of some of the judges of the Supreme Court at Ottawa, in *Lenoir v. Ritchie*, 3 S. C. R. 575. The dignity is not in the nature of a degree like that of Sergeant-at-Law, which confers social precedence, and is therefore a *status*, the creation of which emanates from the Crown as the fountain of honour. It is simply an appointment which may give the right to precedence in the courts by the grace of the judges. But upon them it depends, and they may or may not choose to recognise the holder of the patent, and may or may not choose to call him within the bar.

We have received, but too late for review in this number, several new law books by Canadian authors:—*Surrogate Practice*, by Mr. Alfred Howell; *The Law on Bills of Sale and Chattel Mortgages*, by Mr. John A. Barron, and the *Indictable Offences and Summary Convictions Acts*, by Judge Stevens, of New Brunswick. At present we can only say they reflect credit on the publishers, Carswell & Co. The last-named volume is, as regards type, paper, and general appearance, equal to anything published by the best houses in England.

In addition, we have before us Mr. O'Brien's annotations on the Division Courts Act of 1880. The notes seem

very full, and will be a useful addition to his previous work, which was so well received by those interested in these Courts, which are beginning to encroach rather too hugely on their more sedate brethren.

We are in receipt also of No. 6 of the third volume of *Supreme Court Reports*. We notice a marked improvement in the current volume over the previous ones. It is to be regretted that Mr. Justice Fournier's judgment in the Great Seal case is given in French only, a language all ought to be familiar with, we grant, but the contrary, unfortunately, is the fact.

IMPEACHING THE CREDIBILITY OF WITNESSES.

Lord Denman used to say that law was susceptible of being classified under three heads—(1) Statute law; (2) Case law; and (3) Law taken for granted. A remarkable example of this last division may be found in the usual *nisi prius* rulings of the present day, touching the questions which may be asked when a witness is called to impeach the credibility of another witness. It is usually assumed that the end can only be properly reached by means of a gradation of interrogatories: thus, (1) Do you know the character of the witness for truth and veracity in the neighbourhood where he lives? (2) Is that character good or bad? (3) From your knowledge of his character, so obtained, would you believe him on oath? It does not appear, however, from the authorities that this is by any means a correct view of the law. If we turn to Fitzjames Stephens' "*Digest of the Law of Evidence*," we find it stated that the credit of any witness may be impeached by the adverse party by the evidence of persons who

IMPEACHING THE CREDIBILITY OF WITNESSES.

swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons, he goes on to say, may not, upon their examination-in-chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted. *Art. 123.* This point has been subjected to very minute discussion in Chancery, where the application to put in such evidence was made, after publication, the alleged matter of impeachment having been discovered only after the general examination of witnesses. In *Purcell v. McNamara*, 8 Ves. 323, it was agreed that, after publication, it was competent to examine any witness to this point whether he would believe that man upon his oath. Lord Eldon refers to this decision with approval in a later case of *Carles v. Brock*, 10 Ves. 50, and continues,—“It is not competent even at law to ask the ground of that opinion; but the general question only is permitted.” He says also, in this case, “In examining a witness to credit, the examination is either to be confined to general credit; that is, by producing witnesses to swear that the person is not to be believed upon his oath, or by contradicting the witness you seek to discredit as to particular matters deposed to by him.” The *syllabus* to the case in 10 Ves. puts the point thus: “The general question only is permitted; whether he is to be believed on his oath?” Refer also to *Penny v. Worts*, 2 De G. & Sm. 527, and *Anon* 3 V. & B. 93. In *Mawson v. Hartink*, 4 Esp. 102, Garrow, of counsel, put the question in this way, “Have you the means of knowing what the general character of this witness was; and from such knowledge of his general character would you believe him on his oath?” Lord Ellenborough ruled that this question might be put in that way,

as it would then be open for the opposite side to ask, as to the means of knowing the witness's character; so that it would be judged what degree of credit was due to the question from the means that the witness then called had of informing himself and forming his judgment. The same counsel, when on the bench, as Mr. Baron Garrow, gave his views on this point in *Rex v. Dispham*, 4 C. & P. 392. A witness was called who stated that he had known the witness impeached for three years, and would not believe him on his oath. The Judge then asked “Have you such a knowledge of his general character and conduct that you can conscientiously say that from what you know of him it is impossible to place the least reliance on the truth of any statement that he may make?” And in summing up to the jury, he said a man may have been guilty of such immoral and profligate conduct for a length of time as to convince respectable persons that his statements are wholly unworthy of belief. The question, therefore, really amounts to this, has the witness such a want of moral character that other persons cannot trust a word he says.

In *Sharp v. Scoging*, Holt N. P. Ca. 541, the practice which obtained then, 1817, is very clearly stated. A witness named Chilcott proved the case of the plaintiffs. The defendant then called witnesses who swore they would not believe Chilcott on oath. Gibbs, C. J., said: “When you endeavour to destroy the credit of a witness, you are permitted to call other witnesses who know him, and to ask them this general question,—would you believe such a man upon his oath? You cannot ask them as to particular acts of criminality. But as no man is to be permitted to destroy a witness's character without having grounds to state why he thinks him unworthy of credit, you may ask him his

IMPEACHING THE CREDIBILITY OF WITNESSES—THE DOMINION AND THE EMPIRE.

means of knowledge, and his reasons of disbelief."

In *Macnabb v. Johnson*, 2 F. & F. 293, Erle, C. J., allowed evidence of immorality to be given (as to cohabitation of a person as mistress), as a circumstance tending to impeach the general credit of the plaintiff who had been called as a witness.

The head-note in *Reg. v. Brown*, L. R. I. C. C. R. 70 (1867), expresses the practice thus,—“In order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him on oath; but in the case stated for the opinion of the Court, all that appeared was that the defence proposed to call witnesses to prove that they would not believe witnesses for the prosecution on their oaths; and that the Court declined to receive such evidence.”

In *Rez v. Rudge*, Pea. Add. Ca. 232, Lawrence, J., said that the way in which a witness should be discredited was by general evidence of persons, who were acquainted with him, as to their belief of his credibility on his oath.

From these decisions we submit the weight of authority is in favour of this position, that you can, without any preliminaries, at once ask the question (as indeed it is given in *Roscoe N. P. Evid.*, p. 183, 14th ed.). “From your knowledge of the witness, do you believe him to be a person whose testimony is worthy of credit?” One can easily see how the present formula has taken shape in course of time, namely,—in the anxiety of counsel to anticipate the exposure of the insufficiency of the witness's opinion if it were based on anything short of common repute, and so, by his own manner of questioning, to place the opinion, if possible, on the foundation of general bad character, and not merely on the spleen

or spite of the individual witness. These authorities also show that the enquiry into character, when entered upon in order to impeach veracity, need not be confined to a man's truth-telling or the reverse, but may embrace the totality of his moral character as it stands among his neighbours.

THE DOMINION AND THE EMPIRE.

“May He, who hath built up this Britannie Empire to a glorious and enviable height, with all her daughter lands about her, stay us in this felicity.”
—Milton.

We cannot but congratulate ourselves upon the almost simultaneous production of the three works mentioned below. They seem to indicate a demand for information upon the institutions of our country, which, in a community so young, so free, and with such an extended franchise as our own, it is pre-eminently desirable that every subject should possess. Our days are cast in the early youth of the Canadian national life; the community is plastic to a degree to which it can never be hereafter; and upon ourselves, more than upon later generations, must depend the future of our country.

All who are impressed with this elevating thought must needs welcome warmly and gratefully such a work as that which Mr. Todd has now given to the public. We could, indeed, wish that it were made a necessary book in the curriculum of every university throughout the British Empire. Englishmen could scarcely fail to derive from it increased

Parliamentary Government in the British Colonies. By Alpheus Todd, Librarian of Parliament, Canada; author of “*Parliamentary Government in England*,” &c. One vol. Little, Brown & Co.

The Powers of Canadian Parliaments. By S. J. Watson, Librarian of the Parliament of Ontario. One vol. C. B. Robinson.

A Manual of Government in Canada. By D. A. O'Sullivan, Esq., M.A., of Osgoode Hall, Barrister-at-Law. One vol. J. C. Stewart & Co.

THE DOMINION AND THE EMPIRE.

sympathy with the efforts of colonists to modify and adapt to their altered circumstances those institutions which have made Great Britain the land, above all other lands, where Freedom and Law have met together, and, also, an increased and ennobling pride in the position of their country as the Mother of Nations: while, on the other hand, it could not fail to produce in the mind of colonists renewed love and reverence for the old land, and a more lively and just appreciation of the wisdom and statesman-like moderation with which, for the last forty years at all events, the Home authorities have dealt with the varied interests of the Empire.

Unique, as we believe, of its kind, Mr. Todd's work shows an acquaintance with the records of the Colonial Office, which may well be called marvellous. Admirably printed and arranged, it presents to us, in a convenient and accessible form, not only the general principles on which responsible government in the Colonies is carried on, and reconciled with the supreme authority of the Imperial Parliament and the Crown, but also a series of precedents, taken from the political history of various colonies, containing many verbatim extracts from the most important despatches, and conveniently printed in a somewhat smaller type than that of the general text. On almost all recent and current questions of Canadian politics, Mr. Todd's book directly or indirectly throws light, and wherever he criticises the past, he does so, not in the narrow spirit of the party writer, but without bias and on broad constitutional principles. Moreover, no less in the formal, but most important point of book-making, than in the treatment of the subject itself, does Mr. Todd's work elicit our admiration, and show the old and experienced hand. To the excellence of the type we have already

alluded, and we may add to this a broad margin, a habit of always giving authorities, and of giving them with exactness, so that they may be easily verified; from time to time summing up the results arrived at in a few well-chosen sentences; of always mentioning pages when referring to preceding and subsequent parts of the book; and last, but not least, we find the crowning blessing of a full and admirable index.

We wish we could discover the same care in regard to minor points in the *Manual of Government in Canada*. The general object of this little book must commend itself to all. "The aim of this little Hand Book," the author tells us, "is to furnish such information on the manner in which we are governed as every student should know, and to furnish it in as plain language as the subject will permit in the hands of the author" (p. 1). Nor have we any serious complaint to make as regards the general style of writing. Moreover it is possible, though we cannot agree with him, that the author may consider the fact that the work being elementary renders expedient somewhat scanty and very vague references to authorities. We think we may say that, in no single instance, except occasionally when referring to a case in the Reports, does Mr. O'Sullivan refer to the volume or page of the authority cited. It is less easy, however, to condone occasional carelessness in language. For example at p. 33 the author says: "The speaker must be a Senator; and in this particular *the Senate*, as to that officer, differs somewhat *from the speaker* of the House of Lords, etc." At p. 63 we find: "The Governments of the Provinces are *ones* of enumerated powers." At p. 79, speaking of the executive, Mr. O'Sullivan says: "This is divided into two parts by some writers, viz., Administrative

THE DOMINION AND THE EMPIRE.

and Judicial Government ; *but the three duties of Government in making, explaining and enforcing laws will be found to be convenient.*" Then there is a sentence which has a tendency to make one feel giddy. Speaking of the Auditor-General of Canada, at p. 89, the author writes : "He issues all cheques under the Parliamentary appropriation, and unless in these cases no cheque of the Finance Minister shall issue unless upon his certificate." We fear we might mention many more examples, but will only give one other. At p. 235 occurs this sentence, which we cite without comment : "Local concerns in a large country are managed most satisfactorily by Local Administration ; and *it wont matter any* whether such Administration is a District Council or a Parliament."

These faults, however, though we cannot call them minor faults, do not annul the general merit of Mr. O'Sullivan's work, and may easily be amended before a second edition appears. The little Manual gives much information which "every schoolboy" ought to know, but which is, we fear, possessed by few. Whether, indeed, the author's constitutional doctrine is always sound is questionable. Certainly, Mr. Todd would join issue with him when he says (p. 78) : "This is not saying but that the Crown has certain abstract rights ; *but these are obsolete and disused in England, and can have no application here.*" We may have occasion hereafter to allude to other statements of Mr. O'Sullivan, but will take this opportunity to revert to Mr. Todd's important work.

In his preface Mr. Todd informs us that his book forms the completion of a design, long contemplated, and partly fulfilled by the publication thirteen years ago of his *Parliamentary Government in England*. It is intended to explain the operation of "Parliamentary Govern-

ment," in furtherance of its application to colonial institutions.

After some introductory chapters, Mr. Todd divides the main body of his work into three natural and convenient divisions, viz. :

1. Imperial Dominion exercisable over self-governing Colonies.

2. Dominion exercisable over subordinate Provinces of the Empire by a central Colonial Government.

3. Local Self-Government in the Colonies.

The second part of the book may, indeed, be said to amount to little more than a very instructive and welcome treatise on the British North America Act, and we propose to devote a separate article to it ; and it will be then that Mr. Watson's interesting little volume will most fitly come under our notice. The Dominion, in fact, occupies naturally and necessarily a very large and predominating place in the work, not only because Canada has been the centre of Mr. Todd's labours, but also because to her first of all the colonies was responsible government conceded ; and because in the Dominion we have the only instance in which the confederation of various colonies—the latest stage in England's Colonial policy—has been successfully effected.

Moreover, although Mr. Todd does not forget the avowed purpose of his work, viz., the explanation of the operation of Parliamentary Government in relation to colonial institutions, yet his prevailing idea has evidently been to bring out with special prominence the proper constitutional position of the Crown, as represented, on the one hand, by the Sovereign and his Ministry at Home, and on the other hand by Governors and their Executive Councils in the Colonies. At p. 584, indeed, Mr. Todd says :

THE DOMINION AND THE EMPIRE—COMPENSATION FOR DISTURBANCE (IRELAND) BILL.

It has been the aim of the present writer to define, with the utmost possible precision and impartiality, the actual position and functions of a Governor in his political relations, so far as the same are capable of being determined by reference to authoritative documents and other unimpeachable sources of knowledge.

And in his Preface he says :

I would further remark that in this—as in my larger work—I have directed particular attention to the political functions of the Crown, which are too frequently assumed to have been wholly obliterated wherever a “Parliamentary Government” has been established. In combating this erroneous idea, I have been careful to claim for a constitutional Governor nothing in excess of the recognised authority and vocation of the Sovereign whom he represents ; while, on the other hand, I have endeavoured to point out the beneficial effects resulting to the whole community from the exercise of this superintending office, within the legitimate lines of its appropriate position in the body politic.

We, therefore, propose to lay before our readers some of Mr. Todd's views as to the proper position of the Crown in our constitutional system, and as to the power and functions of Governors in British Colonies possessing responsible government, and to cite some instances in which Colonial Governors have most beneficially exercised their legitimate influence and authority.

(To be continued.)

COMPENSATION FOR DISTURBANCE (IRELAND) BILL.

There has probably been no Bill before the Imperial Parliament, since that for the disestablishment of the Irish Church, which has called forth such intense feeling among the educated classes at home as that which is popularly known as the Irish Disturbance Bill. Before it had passed the third reading in the Lower House it had already caused the resignation of one of the Ministry, the Marquis of Lansdowne ; and if report says true, had very nearly caused a fur-

ther split in the Cabinet by the secession of the Marquis of Hartington and Lord Spencer. Nor was it finally passed before two-thirds of the Liberal majority in the Commons had gone over to the enemy. Perhaps, indeed, it would not have passed at all had it not been considered certain that it would be rejected by the Lords, where, in fact, after a brilliant debate extending over August 2nd and 3rd, last, it was thrown out on the second reading by the enormous majority of 231.

After the first day's debate, the *Times* commenced a leading article on the subject, as follows,—we quote it for the purpose of showing the interest excited by the occasion :—

Seldom in our recent political history has the House of Lords been the centre of so much public interest as it was yesterday, when the Irish Disturbance Bill came on for the second reading. The body of the House, and especially the Opposition side, was crowded with peers to an extent very unfamiliar to those who are accustomed to see the red benches more than half unfilled even upon important occasions. The Peers' Gallery presented a spectacle of unsurpassed brilliancy, and every available inch of room accessible to spectators was invaded by an excited throng. Nevertheless, no critical division was anticipated, nor, perhaps any remarkable display of eloquence. The gravity of the question, however, to be decided by the Upper House in dealing with the Ministerial measure has been brought home to the public mind by recent discussion, not only in Parliament, but in the Press. It is not alone those interested in Irish landed property, or landed property elsewhere, to whom the debate in the House of Lords is a matter of direct concern. To many it appears that the legislation proposed by the Government calls in question the principles by which all proprietary rights whatever are guarded against unjust invasion by the State ; others believe that the Ministerial policy tends to whet the appetite of Irish agrarian agitation and to imperil the true interests of Ireland.

And after the division on the second day an article in the same paper contained the following remarks, which form a good introduction to those passages bearing upon the more exclusively legal aspect

COMPENSATION FOR DISTURBANCE (IRELAND) BILL.

of the question, which we propose to quote from Lord Cairns' now famous speech :—

The debate in the House of Lords last night upon the Irish Disturbance Bill, which ended in the loss of the motion for the second reading by the extraordinary majority of 282 votes to 51, brought to a close a long and embittered controversy. The rejection of the measure upon a division by a great majority was fully anticipated, and the speeches in its favour partook of the gloom and langour of overshadowing defeat. Lord Cairns resumed the discussion upon the assembling of the House in a powerful and exhaustive criticism, which erred, perhaps, upon the side of length and elaboration, but which practically disposed of every argument adduced by the supporters of the Bill. A more thoroughly destructive speech has not often been delivered in Parliament. The late Lord Chancellor may be compared as a master of detail with Mr. Gladstone himself, and in dealing with the questions debated yesterday he had the advantage of an intimate knowledge of Ireland, and of a trained legal intellect. We have great difficulty in believing that any unprejudiced person who listened yesterday to Lord Cairns' lucid and cogent reasoning can have remained unconvinced that the Ministry were from the first ignorant of the real scope and effect of the measure, or that, after they discovered the grave objections to it, they attempted to defend it by crude and hasty arguments. Of the Bill thus originated in ignorance, impatience, and inconsistency, it can be no matter for surprise that it has been found to involve pernicious consequences, of which Mr. Forster, justly confident in the excellence of his own intentions, had no suspicion.

We will, however, first present to our readers, the terms of the Bill itself as amended in Committee. The Bill is worded as follows :—

Whereas, having regard to the distress existing in certain parts of Ireland arising from failure of crops, it is expedient to make temporary provision with respect to compensation of tenants for disturbances by ejectment for non-payment of rent in certain cases ;

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this Parliament assembled, and by the authority of the same, as follows :—

1. An ejectment for non-payment of rent for recovery of the possession of a holding valued or the Acts relating to the valuation of rate-

able property in Ireland at an annual value of not more than £30, situate wholly or partially in any of the Poor Law unions mentioned in the schedule hereto, or where any electoral division is specified in the said schedule situate wholly or partially in such electoral division, and which shall be commenced after the passing of this Act and before the 31st day of December, 1881, or which shall have been commenced before the passing of this Act, and in which any judgment or decree for possession shall be executed after the passing of this Act and before the 31st day of December, 1881, shall be deemed and declared, by the Court having jurisdiction to hear and determine land claims in and for the county in which such holding is situate, to be a disturbance of the tenant by the act of the landlord within the meaning of the third section of the Landlord and Tenant (Ireland) Act, 1870, notwithstanding anything contained in the said Act, . . .

If it shall appear to the Court—

(a) That such non-payment of rent by the tenant is owing to his inability to pay, caused by such distress as aforesaid ; and

(b) That the tenant is willing to continue in the occupation of his holding upon just and reasonable terms as to rent, arrears of rent, and otherwise ; and

(c) That such terms are refused by the landlord without the offer of any reasonable alternative.

2. The acceptance of compensation for disturbance under this Act shall be a bar to any claim under the provisions of the Act passed in the twenty-third and twenty-fourth years of Victoria, chapter one hundred and fifty-four or otherwise, to be restored to the possession of the premises included in the ejectment for non-payment of rent ; provided always, that if it appears to the Court that any person other than the tenant has a specific interest in the holding, notice of the proceedings shall be given to every such person, and so long as any such person may be entitled to redeem the holding no acceptance of such compensation shall be valid, nor shall the amount awarded, or any part thereof, be payable, unless every such person shall consent thereto, or the Court, having regard to all the circumstances of the case shall so direct.

3. The amount of rent which may be allowed by any landlord to accrue due during the period of the operation of this Bill shall not be reckoned against him in calculating the arrear of rent which might in any case of ejectment for non-payment of rent be sufficient to subject him to damages for disturbance under the 9th section of the Landlord and Tenant (Ireland) Act, 1870.

4. This Act may be cited for all purposes as the Compensation for Disturbance (Ireland) Act, 1880, and shall be read and construed for all purposes, including the making of rules for carrying

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into effect the provisions of this Act, as one with the Landlord and Tenant (Ireland) Act, 1870.

It now only remains to add, as the best possible comment on the Bill, that portion of the Lord Chancellor's speech, which deals with the legal side of the question. Earl Cairns, after a few introductory remarks, spoke as follows :—

Now, it is desirable that we should in the first instance know what is exactly the present position of an Irish tenant with respect to his holding. My lords, the great statute with respect to landlord and tenant in Ireland was passed in 1870. It begins by declaring that the relation of landlord and tenant in that country is founded upon contract, and it states that that contract may be either express or implied—that is to say, where the landlord and the tenant have stipulated between themselves upon particular grounds the contract is express; where they have not done so, and where the law imports certain terms into the contract, the contract is implied. But, whether it is express or whether it is implied, it is one entire contract upon which the relation of landlord and tenant is founded. Now, let us put aside for a moment the cases arising under the Custom of Ulster, which are somewhat confusing and have little or no bearing upon the present measure, and let us see what is the position of a tenant in Ireland to whom the Custom of Ulster does not apply. Well, he is bound to pay his rent. If he does not pay his rent, there are three remedies which the landlord possesses. He may distrain for rent in arrear; he may bring a civil action for its recovery; or if there is a whole year's rent in arrear he may proceed to evict the tenant from his holding. And then, supposing that to be done, the law steps in and imports further consequences into the contract. If the tenant is entitled to compensation for improvements, he maintains that title and continues to possess that right even though he should be evicted for nonpayment of rent. Eviction for nonpayment of rent in no way injures his right to compensation for improvements. If he is evicted for any other reason but nonpayment of rent, he may have a claim for disturbance. But, with the law as it now stands, if he is evicted for nonpayment of rent, he has no claim for any payment in the shape of damages for disturbance except in two particular cases specified—the one where there is an old arrear of rent hanging over him, and the other where under tenancies existing in 1870 he can show in the case of a holding under £15 a year that the rent is exorbitant. My lords, those are the conditions under which an Irish

tenant at present holds. But let me say one word with respect to the question of eviction. In addition to the rights which I have mentioned, the tenant in Ireland who is to be evicted for nonpayment of rent has certain other privileges which are peculiar to that country, and which are of considerable value. In the first place he has the right for six months to come to his landlord and tender the rent in arrear, and so redeem his holding; in the next place, he has a privilege which is not unimportant—the Judge who directs the process of eviction has a power which I believe is entirely peculiar to that country, and which would very much surprise a Judge in this country, that in all cases of decrees for ejectment the Judge shall be at liberty to grant such stay of execution as he may in the circumstances consider reasonable. So that the tenant is guarded in this way—he has six months to redeem his holding, and if he can show the Judge any reason why as a question of mercy and kindness he should not be evicted, the Judge has a discretion to suspend the execution of the eviction which has been decreed. That being the present state of the law, let me show your lordships in the next place what this Bill proposes to do. In the first place, with respect to the area covered by the Bill, I do not know whether your lordships have observed the map exhibited in your library which shows by colours the portions of Ireland to which this Bill would apply. But I may further, for the convenience of the House, state roughly that the Bill would apply to more than half the acreage of Ireland—to 11 millions out of about 20 million acres. But that is not a complete statement of the case. Of the four provinces, Ulster, Leinster, Munster and Connaught, we may put aside Ulster, because the Bill would have really no operation in it; and of the other three provinces your lordships may take it roughly that the whole of Connaught and the whole of Munster are covered by the Bill, and that the only province out of Ulster not covered by it is Leinster. Therefore, putting aside the Custom of Ulster, you have two out of the three remaining provinces covered by the operation of the Bill. Well, what does the Bill propose to do? It takes possession of all existing contracts between landlord and tenant, and not only of all existing contracts, but of all existing actions between landlord and tenant, actions actually commenced, actions in progress up to any point short of complete execution. The Bill takes possession of the whole of those contracts, the whole of those actions, and suspends the landlord's right of eviction. My lords, I say suspends the right of eviction, because I do not expect that I shall hear in this House what I most respectfully say is nothing

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more than a quibble used out of doors, that this is not a suspension of the right of eviction, but merely the affixing to the right of eviction certain penalties. My lords, it is just the same thing whether you say to a landlord, "You shall not use your right of eviction," or whether you say "If you do use your right of eviction you shall pay such a sum as is certain to prevent you from resorting to the exercise of that right." (Hear, hear.) The whole foundation of the case for the Bill is that evictions have increased and that they ought to be limited, and, unless the Bill is meant to suspend or limit the right of eviction, the foundation of the Bill falls to the ground. (Hear, hear.) Well, now, my lords, I dwell for a moment upon this for the purpose of reminding your lordships that this is not a question of the freedom of contract. No doubt there was a time when all parties in the State were jealous on the question of freedom of contract. But the fashion of the Liberal party is now to sneer at the idea of maintaining the freedom of contract. (Hear, hear.) But my lords, we have not to argue that question this time. That is not the question raised by the Bill. The question of restraining freedom of contract does not appear to me to arise. The question which does arise is a very different and a much higher one, it is the question of maintaining contracts actually entered into. (Cheers.) The question which your lordships are called upon to investigate and determine is not whether this is a Bill interfering with the freedom of contract, but whether it is a Bill destroying contracts freely entered into. (Hear, hear.) It is well to remember that there are countries—countries too, which we are accustomed to regard as not fettered by the traditions that bind our own judgment—in which the possibility of legislation of this kind is not contemplated. No Legislature of any State in America would pass this Bill, or would impair in any way contracts actually entered into; nor, I am certain, would Congress ever impair the efficacy of such contracts. (Hear, hear.) I listened with interest last night to hear from the noble earl who introduced this Bill whether he could mention any precedent for a measure of this character. He referred to the question of tithe commutation; but the two cases, and the only two he mentioned with regard to contracts, were these. He was good enough to refer to a Bill introduced by me this year, and which passed through the House. It was a Bill that contained one provision between landlords and tenants, and raised the question whether relief should be given to forfeiture for breach of condition in leases. If the noble earl will introduce into this Bill the provisions which were in mine with regard to the terms in which relief of forfeiture can be given as between landlord and tenant, I will vote for

the Bill. My measure proceeded on the principle that all the damage that can be shown by the landlord to be occasioned by the tenant's breach of the conditions of his lease shall be paid fully before the relief can be given to the tenant. (Hear, hear.) So much for the first Bill. The second Bill that he mentioned related to the law of hypothec in Scotland. But did that Bill interfere with any existing contract! If the noble earl will refer to that Bill, which I do not think he has done, he will find that it referred only to future contracts. (Hear, hear.) Now, these are the only precedents for such Parliamentary interference with existing contracts as is here proposed. I wish to ask your lordships next to consider the way in which it is proposed to do this by the Bill. I heard last night a noble lord (Lord Emly), who is not present to-day, express his opinion about the Bill. If I understood him, he said that it was very certain that the Bill, if it passed, would be little resorted to, that there would be scarcely any disputes between landlords and tenants, and that their affairs would usually be settled amicably and peaceably. It is one of the unfortunate things about the Bill that, by an ingenuity which I cannot but admire and lament, it has been arranged in such a way as to make it all but impossible to avoid constant collisions between landlord and tenant. In the jurisdiction of each County Court Judge there are 6,000 or 8,000, or even, in some instances, 10,000 tenants. Unless Irish tenants differ strangely and totally from others, they will be driven by the Bill to make a claim against their landlords in every case. The tenant will naturally say, "Here is a Bill which gives me such a chance as I never had before of getting a considerable sum of ready money. I will take that chance, and decline to pay rent. My landlord will proceed to eviction, and will bring me before the Judge. I shall then make a case against him under the Bill, and I shall proceed to show that, under the circumstances, I cannot pay my rent." Well, there are thirty-three County Court Judges in Ireland, of whom I wish to speak with the greatest respect; but it must needs be that among them there will be difference of action, of thought, and of judgment. One will lean, perhaps, to a more liberal scale of compensation than the others, and another will be more severe on the tenant; but the tenant takes his chance, and, we will suppose, receives from the Judge a sum of compensation money—seven years rental, possibly, or at least four or five. The landlord, of course, cannot draw back, and the tenant remains the mortgagee in possession till every shilling of the compensation is paid. (Hear.) The landlord is compelled either to pay or to allow the tenant to remain in possession till the money is paid, but the tenant, meanwhile, is as free as air. (Hear, hear.) If he

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does not get the sum he reckoned on, all he has to do is to pay his rent within the six months allowed, and to keep his holding. Therefore, if the case goes against the landlord, the landlord is bound; but if against the tenant, the tenant is free. (Hear, hear.) I come next to the inquiry what are the terms indicated in the Bill as sufficient to justify the right of the tenant to compensation from his landlord. He is to prove his inability to pay the rent, and then to show that he is willing to continue in the occupation of his holding on just and reasonable terms as to rent, arrears of rent, and otherwise. I ask if any of your lordships has a clear impression of the meaning of these words. I own honestly that I have not, and the Government last night gave no sort of indication as to the sort of agreement that the tenant is expected to offer. We must therefore endeavour by ourselves to examine the words and see what they mean. I may assume, I suppose, that the Government do not consider it reasonable that no rent should be paid. (Hear, hear.) Do the Government mean that the tenant is to give security for the rent due? If that is meant, it would have been better to have said so in the Bill. But if the words mean neither that the tenant is to pay no rent nor that security is necessary for the amount he owes, it remains only that the tenant should propose to pay a smaller rent than at present. In the first place, I will ask your lordships to consider how far that view is in accord with that heralded to the world as the great inducement to pass the Land Act of 1870. On that occasion the Prime Minister said, "The Bill proceeds on the principle that, from the moment the measure is passed, every Irishman small or great, must be absolutely responsible for every contract into which he enters," and the right hon. gentleman also said on the third reading of the Bill—"By every contract from the date of the passing of the Act to pay any rent, reasonable or unreasonable, he will be absolutely bound, and will not be able to escape the obligation." (Hear, hear.) After the lapse of only ten years, I contrast that with the explanation of the Chief Secretary as to what he proposed by the Bill now before the House. Mr. Forster says,—"The tenant must be willing to try his utmost to pay a reasonable rent"—observe, not to pay, but only to try to pay—"that is, to pay rent either reasonably reduced under the circumstances of the year, or with a reasonable time given in which to pay; and his landlord must be unwilling to make that reasonable reduction or to give him that reasonable time." Is it possible that in ten years such a spirit has come over the minds of the Government opposite—the same men who passed the Land Act—that one of those very Ministers can now come forward and propose, by interlarding every line

of the Bill with the word "reasonable," to cut down the obligations to which they so recently declared that they would hold the tenant? (Hear, hear.)

SELECTIONS.

DRINKS, DRINKERS, AND DRINKING.

The dry and thirsty days of summer are here once more. Drinking is the order of the day. Our bodies require to be constantly moistened internally, else with the thermometer among the nineties, quickly would the human form divine become little heaps of dust and ashes. If we cannot drink just now, let us think about it. Longfellow says, "He who drinks beer, thinks beer; and he who drinks wine, thinks wine." Let us for a few minutes fondly imagine the converse of this to be true, and while we think of beer, cider, wine and ale, let us drink in fancy.

In dealing with this subject, let us take the division suggested by Lindley Murray's definition of a noun, and speak of "person, place and thing."

Then, firstly, as to the "person." A "common drunkard" is not a regular tippler, but one who is frequently drunk. Proof that one was drunk six times on six different days in three months, when there was no evidence of his state on the other days, does not entitle him to the presumption that he was sober on the other days. *Com. v. McNamee*, 112 Mass. 285. The rule of law is that things are presumed to continue *in statu quo*.

An "habitual drunkard" is one who has the habit of indulging in intoxicating drink so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. *Magahay v. Magahay*, 35 Mich. 210.

The phrase "addicted to the excessive use of intoxicating liquors" means not the occasional excessive use, but the habitual excessive use. *Mowry v. Home Ins. Co.*, 1 Big. Life and Acc. Ins. Co. Cas. 698.

A court being called upon to define, in an insurance case, what was meant by saying that "a man had always been sober and temperate," very wisely concluded that such a thing could not be said of

DRINKS, DRINKERS, AND DRINKING.

one who, although usually sober and temperate in his habits, yet occasionally indulges in drunken debauches which sometimes end in *delirium tremens*. *Mutual Benefit Life Ins. Co. v. Hotterhoff*, 2 Cin. Sup. Ct.

To say that a man is "intemperate," does not necessarily imply that he is in the habit of getting drunk. *Mullidex v. People*, 76 Ill. 211. We fancy, however, the courts would not hold the converse of this.

A "saloon keeper" is one who retails cigars, liquors, *et hoc genus omne*. *Cahill v. Campbell*, 105 Mass. 60.

In England, one who on Sunday walked to a spa two and a half miles away from his home for the purpose of drinking the mineral water for the benefit of his health, and then took some ale at an hotel (to keep the water down, we suppose), was held by the Court of Common Pleas to be a "traveller." *Pepler v. Richardson*, L. R., 4 C. P. 168.

England is a small country. One cannot travel far in any direction there without getting his feet damp, like Kanute and his friends. We presume this is why what would here be called "taking a stroll" is there dignified by the name of "travelling."

In considering the question of selling liquor to a "minor," the court held that the fact that a youth wore a beard, and said that he was 21, was no proof that he was an adult. *Gelty v. State*, 41 Ind. 162.

The Bench doubtless believed that although every American boy may become President, still every one is not a George Washington; but that, as Mark Twain says, "Some Americans will lie." As to beards, nature occasionally "bursts out with a chin-tuft" before her turn, or where she should not.

Now as to "place." Judges do not exactly know, at least when on the bench—what a "saloon" is. They say that it does not necessarily import a place to sell liquors; that it may mean a place for the sale of general refreshments, *Kelson v. Mayor of Ann Arbor*, 26 Mich. 325; or that it may mean a room for the reception of company, or for an exhibition of works of art, etc. *State v. Mansker*, 36 Tex. 364. This latter idea shows how

high-toned Texan judges are, and that they have travelled in foreign parts. Neither an enclosed park of four acres in extent, nor an unenclosed and uncovered platform, erected for the rotaries of the Terpsichorean art, and where lager beer is sold, can rightly be considered a "saloon," or a "house," or "building," within the meaning of the Connecticut statute forbidding Sunday selling of intoxicating liquors, etc. *State v. Barr*, 39 Conn. 41.

We opine that the Texan court would have held both this park and platform a "saloon," as there would certainly be "room for the reception of company," and if the dancing was good, and the dresses of any Worth, these would be an exhibition of works of art.

A "cellar" may be referred to as "the above mentioned house." *Com. v. Intoxicating Liquors*, 105 Mass. 181. In England, it was held that a covenant not to use a house as a "beer house" was not broken by the sale under a license of beer by retail to be consumed off the premises. *L. & N. W. Railway v. Garnett*, L. R., 9 Ex. 26. One Schofield had a license to sell beer "not to be drunk on the premises." The bartender handed a mug of beer through an open window in Schofield's house to a thirsty soul, who paid for it, and immediately drank it, standing on the Queen's highway, but as close as possible to the window. The Court of Queen's Bench considered that this was not a case of selling beer "to be consumed on the premises." *Deal v. Schofield*, L. R., 3 Q. B. 8.

As to the "thing" itself. The phrase "spirituous liquors" does not include "fermented liquors." *State v. Adams*, 51 N. H. 568.*

Cider is not a "vinous liquor." *Feldman v. Morrison*, 1 Ill. App. 469. This seems reasonable enough in view of the decision that "vinous liquors" means liquors made from the juice of the grape. *Adler v. State*, 55 Ala. 16.

A "dram" in common parlance, in Texas, means something that has alcohol in it—something that can intoxicate; at

* But ale and strong beer are "strong and spirituous liquors." *Nevin v. Ladue*, 3 Den. 457, one of the most entertaining cases in the books. —Ed. Alb. L. J.

DRINKS, DRINKERS, AND DRINKING.

least so say the judges. *Lacy v. State*, 32 Tex. 227.

Some years ago, in Indiana, they were very virtuous, and the court decided that the mere opinion of a witness that common "brewer's beer" was intoxicating was not sufficient to prove that it was so, unless the testimony of the witness was founded on a personal knowledge of its effects, or of its ingredients or mode of manufacture; and the court could not take judicial notice that it was intoxicating. *Glazo v. State*, 43 Ind. 483.

But alas for the good old days and the childlike innocence of judges and jurymen! Now both courts and juries in that State will take notice of the fact that "whisky" is an intoxicating drink without any proof. *Eagen v. State*, 53 Ind. 162.

In Massachusetts, a jury was held warranted in finding "ale" to be intoxicating, merely on the testimony of a witness who saw and smelled, but did not taste it. *Haines v. Hanrahan*, 105 Mass. 480. Perhaps these twelve men, good and true, had had a view themselves.

In Maine, one may be indicted and convicted for selling for tippling purposes "cider and wine," although made from fruit grown in the State, if the jury find that they are intoxicating. *State v. Page*, 66 Me. 418.

How much and how long would it take the jury to find this out? Would they be allowed to take specimens with them into their withdrawing room, as they do documents, to examine? Or would the judge look upon cider and native wine as Mr. Justice Creswell did upon water? A counsel once objected to a jury having water while considering their verdict. "Why not, Mr. —, why not?" queried the judge; "water is neither 'meat' nor 'fire,' and no sane man can say it is 'drink'; let the jury have as much as they want."*

The "Sabbath night" includes as well the time between midnight on Saturday and daylight on Sunday, as the time between dark on Sunday and midnight. *Kroer v. People*, 78 Ill. 294.

In England, "habitual drunkenness"

is not cruelty in the eyes of the law. (N. B.—'Tis strange that justice should be blind and law a Polyphemus), so to entitle a wife to divorce. L. R., 1 P. & M. 46.

As to the mode of selling, Richards, C. J., thought that selling a "bottle of brandy" for \$1.25 was selling by retail (*Reg. v. Durham*, 35 U. C. R. 508); and in another case, Hagarty, C. J., said that he would assume that a sale of a "bottle of gin" at sixty cents was a sale by retail. *Reg. v. Strachan*, 20 C. P. 184. While in Illinois the court held that proof that intoxicating liquors were retailed "by the drink" warranted a finding that the sale was in "no larger quantity than a quart" (as restricted in the Ill. Rev. Stat., 1845). *Lappington v. Carter*, 67 Ill. 482. See, also, *United States v. Jackson*, 1 Hugh. 531. The judges of this court clearly never heard of the Duke of Tenterbilly. Bishop Hall tells us that this famous nobleman, when returning thanks for his election, took up his large goblet of twelve quarts, exclaiming, should he be false to their laws, "Let never this goodly formed goblet of wine go jovially through me," and then, says the historian, "he set it to his mouth, stole it off every drop, save a little remainder, which he was by custom to set upon his thumb's nail, lick it off as he did."

Now that we have finished, we fear that the foregoing will not prove as satisfying as the descriptions of Hawthorne's old Inspector, and that not only is the reader and the writer, but also the thing written is "dry."

R. V. ROGERS, JR.

Albany Law Journal.

CIRCUMSTANTIAL EVIDENCE.

About thirty years ago Paul Kunkel accompanied his brother to Baltimore, whence the latter was to sail for the home of his nativity in Germany. Having seen him off, Mr. Kunkel started on foot for his home in York, carrying with him an old umbrella. With him was a companion, who left him at Cockeysville, intending there to take the train and ride to Glenn Rock, his destination, having become tired of footing it. Kunkel kept on his way on foot, and at

* The oath of the officer in charge of the jury, down this way, says "water excepted."—Ed. Alb. L. J.

CIRCUMSTANTIAL EVIDENCE.

Parkton met with a stranger with whom a conversation was begun, which finally ended in an exchange of umbrellas, the stranger giving a much better one than that which he received. Together the two men then kept on their way, until York was finally reached, and the stranger, who gave his name as Conrad Winter, persuaded Kunkel to receive him at his home. Winter remained with the Kunkels for several days, and had with him a number of articles which he endeavoured to give or sell to the family. He offered a pair of ladies shoes in exchange for one of Kunkel's shirts, and the bargain being a good one, as the shoes were quite new, it was accepted. He offered a cap to one of the boys, but it being too large, was told to keep it, and also presented a handsome snuff-box to one of the children, which was likewise declined, on the plea that the child had no use for it. On the first morning of his arrival he stated that a murder had been committed in Maryland, and that the murderer had not been caught. Soon after his departure, it was learned that a murder had recently been committed near Parkton, on the morning on which Kunkel had been seen in the place, and detectives, who were already on the trail, traced Kunkel to his home, where the umbrella and the pair of new shoes were identified as the property of Mrs. Cooper, the victim. He was at once arrested and thrown into the jail at York, where he was kept several months, being finally taken to Baltimore. Mrs. Kunkel, about that time gave birth to a child. Paul Kunkel, under the weight of trouble, became insane, or at least his reason was so unsettled that he could not give a lucid explanation of how the things had come into his possession, or from whom he had obtained them. A true bill was found against him, and several trials were had, which resulted in his conviction and sentence to death; the period of his confinement in the Baltimore prison was about ten months, during which time every effort was made to establish his innocence. Persons from York testified to his uniform good conduct, but the circumstantial evidence of his being in the vicinity at the fatal

time, and the possession of the articles, was too grave to be overthrown. Being a Roman Catholic, the bishop of Philadelphia took a great interest in his case, visiting him in his prison at York, and, it is understood, in Baltimore also. Finally, about eight days before the time fixed for the execution, his mind became clear, and he was able to explain his leaving Baltimore with one man, and his meeting with the other, with whom he exchanged umbrellas, and described them both. Officers of the law were put upon the track, and before long the man with whom he left Baltimore was found, who, strange to say, shortly after parting with Kunkel, had met with Winter, and had seen the umbrella, shoes and other articles. Winter's appearance was described, tallying with that given by Kunkel, and once more the officers were successful in their search, Winter betraying himself by one of those slight actions which so often lead to the arrest of criminals when they feel the safest.

During all this time Winter, who was a blacksmith, had kept in his possession the stolen snuff-box, and one day, while at work at Ashland, pulled it from his pocket and handed it to a fellow-workman, who wished a pinch of its contents. This workman discovered what the murderer never had, that the name of Mrs. Cooper was engraved upon a silver plate within the box. Being familiar with the incident, he at once informed an officer, who made the arrest, and upon trial Winter was convicted and condemned. Paul Kunkel was saved.

Upon the scaffold Conrad Winter confessed his guilt, stating that when young he had been bound to a Mrs. Goodwin, residing near Parkton, who had compelled him to steal sheep for her benefit. On one of his expeditions he was captured and sent to the penitentiary for his offence, and while there swore revenge upon his mistress when he should be released. On the evening of the murder he was walking along the road when before him he saw a woman whom he took to be Mrs. Goodwin. Seizing a stone, a heavy blow crushed her skull, and she fell dead. Upon turning her over and seeing her face, he found that he had killed the wrong woman, it being Mrs. Coope,

ESCAPE.

Drawing her to a fence corner he covered her with brush, took possession of the shoes she had just purchased from the store, with the other articles, and made his escape, meeting with Kunkel, and caused suspicion to be cast upon him as stated. Mr. Kunkel has lived to a good old age in the community, respected by all, the dark cloud of suspicion once resting upon him having been happily cleared away.—*Washington Law Reporter*.

ESCAPE.

We have long thought that to punish a prisoner for escape is a refinement of cruelty. To escape from restraint is an instinctive impulse. We see it in the smallest children. Man but obeys his natural promptings in breaking gaol. Why should society punish him for it? Why should an officer of justice be justified in pounding to a jelly or in shooting to death an escaping prisoner, charged with felony, if he cannot otherwise prevail on him to stay? Why may not society just as logically punish him for not having voluntarily given himself up to justice, as for trying to get away when justice has overtaken him? If a man cruelly whips a runaway horse, or tortures a squirrel recaptured after escape from his revolving cage, or a runaway dog which sees preparations for putting him to churn, Mr. Bergh will be on his track very quickly. Why punish a man for himself obeying the same instincts? It may be said, because he knows better than to escape. We should rather say he knows better than to stay to be caught or punished.

The foregoing may sound like a midsummer jest to old lawyers, but we are deadly serious. We have good backing, too. Dr. Wharton says, 2 *Crim. Law*, § 1678, note: "Whether, in a humane jurisprudence, the unresisted escape of prisoners from custody is a punishable offence, may well be doubted. The later Roman common law holds that it is not. The law of freedom, so argue eminent jurists, is natural; the instinct for freedom is irrepressible; if the law determines to restrain this freedom, it must

do so by adequate means; and it cannot be considered an offence to break through restraint when no restraint is imposed. Undoubtedly it is a high phase of Socratic heroism for a man condemned to death or imprisonment, to walk back, when let loose, to be executed or imprisoned. But the law does not undertake to establish Socratic heroism by indictment. It would not be good for society that the natural instinct for self-preservation should be made to give way to so romantic a sentiment as is here invoked; and it is a logical contradiction to say that the scaffold and the cell are to be used to prove that the scaffold and the cell are of no use. If men voluntarily submit to punishment, then compulsory punishment is a wrong. Besides this, a jailer may argue that if we hold that a prisoner is under bond as much when he is let loose as when he is locked up, there is no reason for over-carefulness in locking up. Following these views, the conclusion has been reached that an unresisted escape is not *per se* an indictable offence, and this view has been adopted by all modern German codes. The English decisions on this point may be too firmly settled to be now shaken; but considerations such as those which have been mentioned may not be without their use in adjusting the punishment on convictions for unresisted escapes."

It seems to us more reasonable to reward a prisoner for staying quietly and obediently in jail, as some States now do, than to punish him for running away. If it is cruel to punish a man for breaking jail, what shall we say of punishing his wife for aiding him?

The law is guilty of cruelty quite worthy of the inquisition in this regard. For example, an imprisoned convict went by permission of his keeper about the land connected with the jail, went to market and brought back provisions for the inmates of the jail, cooked food for them in the kitchen of the dwelling-house attached to it, went to the adjacent barn and there fed and milked the cow, and from the barn departed and left the State. *Held*, a criminal escape. *Riley v. State*, 16 Conn. 47. What a cat-and-mouse-play doctrine is this! Even if the jail is so unhealthful and filthy as to endan

ESCAPE.

ger his life, he is punishable for breaking out (*State v. Davis*, 14 Nev. 439). "The necessity, to excuse," say the court, "must be real and urgent, and not created by the fault or carelessness of him who pleads it." He should have "exhausted the lawful means of relief in his power before attempting the course pursued. It was not shown or claimed that he had ever complained to the sheriff or the board of county commissioners, or that he had ever endeavoured to obtain relief by any lawful means." Well, suppose he had complained, and his complaints had not been heeded, he could not help himself. So held in *Stuart v. Board of Supervisors*, 83 Ill. 341; S. C., 25 Am. Rep. 397; *People v. Same*, 84 Ill. 303; S. C., 25 Am. Rep. 461. In these cases there was a disclosure of frightful filth and unhealthfulness, but the Court of Chancery in the first case said the prisoner had a remedy at law, and they would not enjoin the use of the jail; and in the latter the court of law said that they could not compel the supervisors to provide a suitable jail, so long as they provided any. So the prisoner had to stay until the bugs should carry him out. It is a comfort, however, to know that if the jail takes fire he is not bound to stay and be burned to death; 2 Whart. Crim. Law, § 1676; and that he may go to a necessary, in the yard, at night to attend a call of nature, if there are no accommodations in the jail. *Patridge v. Emmerson*, 9 Mass. 122. But he cannot go for this purpose to the yard unless there is a necessary in it. *McLellan v. Dalton*, 10 id. 191. The two last were cases of imprisonment on civil process.

But he is bound to stay in jail even if he is innocent. So held in *State v. Lewis*, 19 Kans. 260; S. C., 27 Am. Rep. 113. The prisoner awaiting trial on a criminal charge, escaped, and being rearrested, was tried and acquitted of that charge. Then they tried him for escape, and held that he could not plead his acquittal of the main charge as a defence. "He escaped 'before conviction,'" say the court. "When a party is in legal custody, and commits an escape, we do not think that it depends upon some future contingency whether such an escape is an offence or not." Perhaps so, if you try him for the

escape first, but if it is first demonstrated that he is innocent of the main charge, and consequently had a legal right to go free, why punish him for going free without awaiting the legal demonstration? In *People v. Washburn*, 10 Johns. 160, the prisoner was held not indictable for aiding the escape of one indicted "on suspicion of having been accessory to the breaking" of a certain house, "with intent to commit a felony," because no distinct felony was thus charged. But according to the Kansas court the escaping prisoner must have waited to have the indictment quashed.

And finally, to cap the climax of absurdity, the law holds that a prisoner has escaped when he has not actually escaped, but has the means of escape, as where, on civil process, the sheriff committed a jailor to his own jail, of which he continued to hold the keys, but where he remained. *Steere v. Field*, 2 Mass. Under this doctrine St. Peter would have been indictable for escape, although he did not offer to go, and assured the jailor, "we are all here." So in this case the law holds the prisoner to blame for *not* following the instincts of nature, and availing himself of the opportunity to set himself free.—*Albany Law Journal*.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

SUPREME COURT OF CANADA.

JUNE SESSIONS, 1880.

PARSONS V. THE QUEEN INSURANCE CO.
PARSONS V. THE CITIZENS' INSURANCE CO.
JOHNSTONE V. THE WESTERN ASSURANCE
COMPANY.

Insurance—Jurisdiction of Local Legislatures over subject matter of Insurance—Secs. 91 and 92 B. N. A. Act—"The Fire Insurance Policy Act" R. S. O. c. 162—Applicable to foreign and Dominion Insurance Companies—What conditions applicable when statutory conditions not printed on the policy.

The Queen Insurance Company, an English company doing business under an Im-

perial charter, the Citizens' Insurance Company—incorporated by an Act of the Dominion Parliament, passed in 1876—and the Western Assurance Company, incorporated by the Parliament of Canada before Confederation, and whose charter was subsequently amended by the Dominion Parliament, having been authorized to do fire insurance business throughout the Dominion of Canada by virtue of a license granted to them by the Minister of Finance under the Acts of the Dominion of Canada relating to Fire Insurance Companies, issued respectively in favour of the plaintiffs, The Queen Insurance Company an interim receipt, and the other two companies a policy of insurance, whereby they insured certain properties situate in the Province of Ontario.

In all these cases, which were decided by the Ontario Courts in favour of the plaintiffs (see 4 App. Rep. pp. 96, 103, and 281), the question of the constitutionality of the Ontario "Fire Insurance Policy Act," R. S. O. c. 162, was raised, and the Supreme Court of Canada, after hearing the arguments in all these cases, delivered one judgment treating separately the other points raised on the argument by each particular company, and it was—

Held, 1. That the Fire Insurance Policy Act, R. S. O. c. 162, is not *ultra vires*, and is applicable to insurance companies (whether foreign or incorporated by the Dominion) licensed by the Dominion Parliament to carry on insurance business throughout Canada.

2. That the legislation in question prescribing conditions incidental to insurance companies contracting within the limits of the Province is not a regulation of trade and commerce within the meaning of these words in sub-section 2, section 91, B. N. A. Act.

3. That an insurer in Ontario who has not complied with the law in question, and has not printed on his policy or contract of insurance the statutory conditions in the particular manner indicated in the statutes cannot set up against the insured his own conditions or the statutory conditions; the insured, alone, in such a case, is entitled to

avail himself of any of the statutory conditions.

Per TASCHEREAU and GWYNNE, J. J., dissenting.—That the power to legislate upon the subject matter of insurance is vested exclusively in the Dominion Parliament by virtue of its power to pass laws for the regulation of trade and commerce under the 91st section of the B. N. A. Act.

Robinson, Q. C., and *Bethune, Q. C.*, for appellants, and *McCarthy, Q. C.*, for respondents in *Citizens Ins. Co. v. Parsons*.

Robinson, Q. C., and *Small* for appellants, *McCarthy, Q. C.*, for respondents in *Queen Ins. Co. v. Parsons*.

Bethune, Q. C., and *Mowat, Q. C.*, for appellants, and *McCarthy, Q. C.*, for respondent in *Western Assurance Co. v. Johnstone*.

BICKFORD v. LLOYD.

Award—Motion to set aside—Time for moving.

This was an application by the Court of Chancery to set aside an award. The award was made on the 13th August, 1878; Trinity Term began on the 26th August and ended on the 7th September,—Michaelmas Term began on the 18th November and ended on the 7th December. The notice of motion was given on the 2nd December, 1878. Before the Supreme Court the plaintiff contended *inter alia* that the delay had been caused by the act of the party supporting the award, who had on the 14th September before the end of the next term served a notice on him of his intention to appeal.

Held—Affirming the judgment of the Court of Appeal for Ontario that the submission being made within the 9 & 10 Wm. III. the application to set aside the award was too late, and no sufficient reason had been assigned for the delay.

Hector Cameron, Q. C., for appellant.

McCarthy, Q. C., for respondent.

WELLINGTON MUTUAL INS. CO. v. FREY.

Mutual Insurance Company.

Held—That a policy issued by a Mutual Insurance Company is not subject to the requisites of the R. S. O. c. 162, and

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[C. of A.]

therefore the appellant company were entitled to set up against the insured a non-compliance with the provisions of 36 Vic. c. 44.

Ballagh v. Royal Mutual F. In. Co. approved of.

CANADA SOUTHERN RAILWAY CO. v. NORVELL, DUFF, CUNNINGHAM AND GATFIELD (4 cases).

Award.

Appeals by the Canada Southern Railway Company from the order of the Court of Appeal of the Province of Ontario, dated the 14th day of January, 1880, which dismissed the appeal of the Canada Southern Railway Company to that Court from the decrees pronounced in four cases in the Court of Chancery, wherein Norvell and other respondents were plaintiffs, and the Company defendants, by the Hon. Vice-Chancellor Proudfoot in favour of the said Norvell and others. The decrees, after making The Canada Permanent Loan and Savings Company, and the Molsons Bank, parties, plaintiffs, in the Norvell suit, as encumbrancers upon Norvell's interest in the lands in question, declared that the said Norvell and others were entitled to enforce against the Company the specific performance of the awards set out in the bills of complaint, and that the Company should pay to Norvell the sum of \$9,294 92, being the amount of his award with interest and costs; and to Cunningham \$2,480; to Duff, \$2,500; and to Gatfield, \$1,680; and upon payment that they should release to the Company the lands which had been expropriated by the Company for their line of railway.

Before the Supreme Court of Canada the Counsel for the appellants for the first time contended, 1st. That the award in Norvell's case was bad, because the arbitrators had dealt only with the equity of redemption interest of the amount. 2nd. In all the cases that the awards were bad on their face, as being signed by only two arbitrators without notice to the third, and that the awards should show that the third arbitrator was notified, as a condition precedent to its validity—and it was

Held, Per CURIAM—That Norvell should be at liberty to amend his answer to raise the point that the award is invalid as being in terms confined to the limited interest of the land owner as mortgagor instead of embracing the whole fee simple of the estate, and when answer so amended, the judgment to go without costs that the award is void for that reason.

In the cases of Duff, Cunningham, and Gatfield, appellants, to be at liberty to amend answers by raising the points as to the award being made in the presence of two arbitrators only, in the absence of the third, and without notice to the third. If the land-owner in each case before the tenth day of September, 1880, files a signification signed by counsel that he desires a new trial, judgment to go therefor without costs to either party; but if he declines a new trial, then judgment in answer may go for the Company without costs.

Cattanach, counsel for appellants.

J. A. Boyd, Q. C., for respondents.

COURT OF APPEAL.

From C. C. York.]

[June 2.]

CAMPBELL v. PRINCE.

County Court—New trial—Matter of discretion—Costs.

Although the jurisdiction of the Court of Appeal is not limited in appeals from the County Court as it is in appeals from the Superior Courts under sec. 18, s.s. 3 of the Appeal Act, it will not in ordinary cases interfere where a new trial has been refused in the Court below upon a matter of discretion only. In this case, however, where the new trial was asked for on the ground that the verdict was against evidence, the Court of Appeal granted a new trial as the evidence strongly preponderated in the defendant's favour, and the learned Judge had misdirected the jury. No costs of appeal—Costs of former trial to abide the event.

Ferguson, Q. C., for the appellant.

Delamere for the respondent.

Appeal allowed.

C. of A.]

NOTES OF CASES.

[Chan.]

From Proudfoot, V. C.]

[June 2.]

MCLEAN v. CALDWELL.

Interlocutory injunction—Irremediable injury—Balance of convenience.

The bill was filed by the plaintiff for the purpose of having it declared that he was entitled to the user of certain streams where they flowed through his lands, as well as to the improvements which he had constructed thereon, and to restrain the defendants from using these improvements in floating down their logs.

Proudfoot, V. C., granted an interlocutory injunction restraining the defendants from using the improvements until the hearing, on the plaintiff's giving the usual undertaking to pay damage in case the Court should be of opinion that the defendants sustained any injury by reason of the order.

Upon appeal the Court of Appeal reversed this order of the Vice Chancellor, on the ground that it was not shewn that irremediable damage would be caused the plaintiff by not granting the injunction, nor that the balance of inconvenience preponderated in his favour.

Bethune, Q. C., & C. Moss, for the appellants.

Blake, Q. C., & Creelman for the respondents.

Appeal allowed.

From Q. B.]

[June 30]

BACKUS v. SMITH.

Lateral support—Easement.

The house which the plaintiff occupied as tenant to S., fell two days after the defendant H. had excavated the adjoining lands, which he owned, to within a few feet of his line, close to which the house stood and the plaintiff sued to recover damages for injury to his business. The house in question was built by S. in 1854 upon planks laid about one foot under the ground, so that he could remove it at the end of the ten years' lease which he held. S., however, afterwards acquired the fee and before the expiration of the twenty years, in 1871, he became the owner of the defendant's lot for about a year, when he

conveyed it to H. There was no evidence that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way, or that the excavation would have damaged the plaintiff's land unweighed by the house.

Held, that there had been no such user of the servient tenement as to justify the presumption that an easement had been acquired by grant, nor had there been twenty years possession of the support as an easement owing to the unity of seisin of S.

Held, also, reversing the judgment of the Queen's Bench, that as the plaintiff had no right to support the defendant's land, and as the only evidence of negligence was that the defendant excavated to within a few inches of his line the plaintiff could not recover.

Robinson, Q. C., for the appellant.

Boyd, Q. C., and C. R. Atkinson, for respondent.

Appeal allowed.

CHANCERY.

Proudfoot, V. C.]

[July 28.]

GIVINS v. DARVILL.

Will, construction of—Life estate—Vendor and Purchaser's Act.

A testatrix devised all her estate to trustees, and directed that part should be retained as a residence for her two younger daughters until they should marry, when the property was to be sold and the proceeds added to and form part of all the residue of her estate to be equally divided amongst all her "children—sons and daughters—share and share alike, then living." The two daughters attained majority and remained unmarried, when a contract was entered into by all the children of the testatrix and the trustees of the estate with the defendant for the sale of the property so directed to be retained.

Held, that the two daughters had, under the devise a perfect right on attaining 21 to dispose of their estates for life and while unmarried, and that all the children, in-

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NOTES OF CASES.

[Chan.

cluding the two younger daughters, and the trustees joining in a conveyance could convey a good title to the purchaser.

VAN NORMAN V. GRANT.

Practice—County Court—Garnishee proceedings.

Proceedings were taken before a County Judge to garnish certain moneys payable by the County to the plaintiff, as Clerk of the Peace and County Crown Attorney, and which moneys that Judge ordered to be attached in favour of the defendant, whereupon the debtor—the defendant in those proceedings—filed a bill in this Court seeking to restrain proceedings on such order.

Held, that this Court had not jurisdiction to grant the relief asked; that the proper course to obtain the relief sought was to appeal from the ruling of the Judge to the Court of Appeal; and without determining whether the claim of the debtor against the County was such as could be garnished. The motion was refused with costs.

DAVIDSON V. MCGUIN.

Fraudulent conveyance—Insolvent Act—Marriage.

M. had been carrying on business in partnership, and in October, 1876, purchased his partner's interest for \$1,332. About this time M. was paying his addresses to the defendant, whom he led to believe, as he himself believed, that he was doing a flourishing and profitable business, and during the negotiations for their marriage, the defendant's father proposed to M. that he should erect a house he was speaking of building, on a lot of his (the father's), and that he should convey the same to his daughter as a marriage dowry, to which M. assented. The marriage took place in November of that year, and during the following year M. erected a house on the lot as proposed, at a cost of about \$900, and in fulfilment of the arrangement the father conveyed the lot to his daughter. In January, 1880, M. became insolvent, and a bill was filed by his assignee impeaching the transaction as a fraud upon creditors under the 132nd section of the Insolvency Act of 1875. The Court (Proudfoot, V.C.) thought

that the evidence did not establish any fraudulent intention on the part of M., and distinctly negatived any knowledge by the defendant or her father when entering into the arrangement, of any such intention; and that, under the circumstances, the transaction could not be impeached under the statute of Elizabeth and dismissed the bill with costs.

SHERITT V. BEATTIE.

Practice—New hearing—Surprise.

A defendant knew exactly the question to be tried at the hearing, but took no steps to adduce any evidence on his behalf, and a witness whom he would have called was called by the plaintiff and gave evidence which the defendant swore was different from what he had anticipated he would give.

Held, that this was not such a case of surprise as entitled the defendant to have the cause opened and a new hearing had; and a motion made for that purpose was refused with costs, although the defendant swore that the evidence given by the witness was incorrect and would be contradicted by the wife and son of the defendant.

CLEAVER V. THE NORTH OF SCOTLAND CANADIAN MORTGAGE COMPANY.

Specific performance—Compensation for crops.

By the terms of a notice and condition of sale it was stated that there were 50 acres of fall and spring wheat and peas on the premises. The fact was that one half the crops were owned by parties in possession of the lands, under an agreement with the owner.

Held, that a person purchasing at the sale was entitled to compensation for one-half the crops, the value of which, unless agreed to by the parties, should be ascertained on a reference to the Master.

Proudfoot, V.C.]

[August 17.

MERCHANTS' BANK V. GRAHAM.

Mortgagees and joint owners of vessels—Evidence.

A mortgagee of a vessel, until he takes

possession, or does something equivalent thereto, is not entitled to an account of the money earned by the vessel for freight. But where in a suit, by the mortgagees of a part-owner of a vessel, the defendant, the owner of the other shares, admitted that he was sailing the vessel for the joint benefit of himself and the other owners, other than the plaintiffs, though previous to the institution of the suit he had only asked for evidence that the agent of the plaintiffs really held for them :

Held, that the fair inference was that the defendant was sailing for whomsoever might be the owners, or entitled to the earnings, and that, having had sufficient information to acquaint himself of the fact that the plaintiffs had not acquired an absolute title to the shares mortgaged to them, he had thus recognised the right of the mortgagees to demand an account.

Quere, whether co-owners of a vessel have a right to share in the profits thereof, earned in ventures to which they do not assent ; as a majority of the owners can employ the vessel against the will of the minority, who, however, can compel the majority to give a bond to restore the vessel in safety, or pay the minority the value of their shares :—In such case the minority do not share the hazard, neither are they entitled to the benefit of the voyage.

One C. entered into agreements with several parties to carry freight for them at certain named prices, "to be paid to the defendant," not mentioning any particular vessels in which the same was to be carried, and then agreed with the defendant, as part-owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon ; and the defendant and C. both swore that the arrangement had not been made by C. as the agent of the defendant :

Held, that the fact of the defendant having rendered an account in his own name, and also such for a portion of the freight, was not sufficient to countervail the positive denials of the defendant and C. that the contracts had not been made on behalf of, and as agent for, the defendant ; freight being *prima facie* payable to the master of

a vessel, and the cargo need not be delivered by him until the freight thereof is paid ; although in any other transaction such conduct would have been very strong evidence of the defendant having been the principal contractor.

CANADA REPORTS.

ONTARIO.

INSOLVENCY CASES.

IN RE CRONK.

Married woman—Claim on husband—Insolvent estate—Money paid him by her.

[St. Thomas, Aug. 4.]

The claimant was a widow when she married the insolvent ; her former husband had devised lands in trust for the benefit of herself and an only daughter. After her marriage with the insolvent she handed over the rents of the lands to him, which he used in his business. No entries were made in his books of the receipt of such moneys, nor had she any memorandum acknowledging such receipt. The daughter lived with her mother as a member of the family of the insolvent during her minority. In liquidation of the daughter's share of the rent, the insolvent purchased a piano for her, which she accepted as in full of her claim. After the estate of the insolvent was placed in compulsory liquidation, the wife claimed all the rents for more than eight years with interest, and sought to be ranked as a creditor therefor. She had also owned separate property which the husband induced her to sell and give him the proceeds, some \$800. In order to secure her in that sum, he caused the title of certain land in Aylmer to be conveyed to her and himself jointly. He subsequently fell in arrear with his creditors, and induced her, in order to improve his credit, to part with her interest and convey it to himself on the express stipulation and condition that he would purchase other property worth \$800, and have it conveyed to her own use. That was never done. His affairs were placed in liqui-

Ont. Rep.]

IN RE CHONK.

[Insol.]

dation by his creditors, and his wife sought to rank upon his estate for both claims, on the ground that she and her husband had often "reckoned up" what sums he had got from her from time to time, but the assignee contested the claim as there were no entries of the transactions on the books of the insolvent, and nothing in writing to show the existence of any debt whatever.

HUGHES, Co. J.—I think with regard to a large portion of this claim, that, under the rule laid down in the case of *Lett v. Commercial Bank*, 24 U. C. R. 552, I must hold the claimant precluded from the right to recover, for, apart from the Statute of Limitations, if the wife chooses to give her own money to her husband, to enable him either to carry on his business, or to be used as the common fund of the family of her husband and her daughter and herself, or if she gave him money out of her own personal separate estate to enable him to purchase goods, or pay off his debts, or keep good his credit, it then becomes his money, and as set forth in the judgment of Hagarly J., at page 561 of the case above noted, "It can hardly be believed that the legislature intended that a large amount of rents received by a married woman from her separate estate should be employed in buying a stock of goods with which the husband might open a shop, contract debts with various persons, and that, neither the goods, nor the moneys received from their sale, could be touched by his creditors."

The parties were married since 1859, and there was no ante-nuptial contract. The former husband of the claimant devised certain property to her, out of which she derived an income to her own use and to the use of her daughter. That money, when received by the claimant, was handed over, from time to time, to this insolvent, her present husband, without any memorandum or entry of any kind being given or made to evidence or show its being a loan to her husband. And with the exception of the money referred to in the fourth paragraph, I think I must hold their occasionally reckoning up how much money he had got from her from time to time in that way did not constitute it a

debt proveable against his estate. On the contrary I must and do hold that she gave it to him to enable him to carry on his business and keep good his credit, and for the common good of the whole family—to promote their prospects and interests in life, and that it was "controlled and disposed of" by the insolvent, with the consent of the claimant, and that no *chose in action* or claim, as for a debt, could or did arise in respect thereof. Under the circumstances which appear in this contestation, she could give away all such moneys just as she might choose to any person, or invest them in securities and dispose of the accumulation as she might please; or she might apply them to the support of her husband and his family, and, in many other ways, enjoy the substantial benefits of the statute protecting her separate property, without subjecting her husband to an action, as for a debt or as for money loaned in respect thereof.

I do not think the numerous cases cited in the argument, by the claimant's counsel, are at all analogous to this case. I think the payment by the claimant to the insolvent, her husband, of the moneys received by her on the rent of her former husband's farm, which was her separate estate, has no right to be treated as a debt, for, according to my views of the intention of the parties, under the circumstances set forth in the evidence, it operated as a reduction of so much into the possession of the insolvent, her husband, and cannot be recovered back, especially as there is no evidence furnished by any entry in his books of a contrary intention, in fact no entry at all.

Then as to the claim of the \$800 and the interest thereon, it was, after being handed to the insolvent to be paid to his creditors, secured by a title made to herself and the insolvent jointly, of the fee simple of and in a house in Aylmer. This title she afterwards parted with, and conveyed her interest to the insolvent, because, as she herself says, his credit would be better—that she received no consideration whatever for making that conveyance; there never was any writing between them in respect of her giving up that title and interest, and there never was any reckoning of what, it

is now alleged, the insolvent owed her for either principal or interest.

The claimant says she does not claim the whole \$300, because the \$258 paid the daughter was to be deducted out of it, so that that would leave a balance due and claimed by her of \$542 and interest. I may say with regard to that, that I think the claim a just one, inasmuch as the debt was plainly secured to her, and she parted with her interest in the estate, upon which it was secured, on the distinct understanding and contract on the part of her husband, that the insolvent was to procure her another house in lieu of such security. The purpose for which she parted with her interest in the real estate was to make it appear that he was the sole owner of it, whatever his personal liabilities in respect to the change of title might be; and, as I have no doubt that the Court of Chancery would have, on a bill filed for the purpose, had the insolvent been in a position to carry out the arrangement, ordered the husband to have satisfied the balance due her by the purchase of another property (see *Ex parte Pyke v. Gleaves*, 7 L. T. N. S. 46), I think I am justified in deciding this contestation as to the said sum of \$542 and interest due thereon in favour of the claimant.

I therefore find that there was and is due to the claimant for principal the sum of \$542, and for interest for six years, \$195, making together the sum of \$737, for which sum I order the said claimant to be collocated on the said estate as a creditor thereof.

And lastly, I order the costs of the said contestation to be paid by the contestant out of the said estate, after taxation.

QUEBEC.

QUEEN'S BENCH.

REGINA V. BERTHE.

Indictment—Setting fire maliciously to manufactured lumber—22-23 Vic. c. 22, s. 11.

[July Term, 1880.]

The prisoner Berthé was indicted for having, "at the township of Wright, feloniously, unlawfully, and maliciously set fire

"to a certain quantity of manufactured lumber, to wit, three thousand shingles "and nineteen piles of boards," and the indictments against the other prisoners, after setting forth that Berthé had set fire to the lumber in question, charged them with having aided and abetted Berthé in so doing.

Aylan and Foran, for Berthé, upon his arraignment, moved to quash the indictment on the ground that it did not allege that the setting fire was done "so as to injure or to destroy" the lumber in question;—32-33 Vic. c. 22, s. 11 (Ca).

Fleming, for the Crown, and *Gordon*, for the private prosecution urged that if the indictment were insufficient under s. 11, it was valid under s. 21, which makes the setting fire to "any stack of corn . . . any steer or pile of wood or bark" a felony.

The defence replied that s. 21 applied only to firewood or wood in an unmanufactured condition.

BOURGEOIS, J. I have given much thought to the points raised by the defence. The indictment is assailed on several grounds, but more especially because it is not averred that the setting of the fire injured or destroyed the lumber. A party charged with a statutory offence has a right to see that every ingredient of the offence is stated. No matter how grievous the charge, no one should be held to answer an indictment which sets forth no crime. It has been urged that the accused should be put upon his trial, and be left his recourse in error; but this would be most unfair, and where there is a material irregularity, the Court will even stop the trial after evidence has been put in. The charge cannot evidently be sustained under sec. 11. It was suggested by the Crown that it might be upheld under sec. 12, and this shows the unfairness of the pretensions of the prosecution. How can the accused know what to plead when the accuser is ignorant or doubtful of the charge he intends to prefer? No attempt is set out, so that sec. 12 cannot be relied on. The argument that the prisoner may be held under sec. 21 is plausible. The perusal of that section, however, shows that it cannot be held to apply to manufactured lumber. "Wood"

U.S. Rep.]

SHORT V. BALTIMORE CITY PASSENGER RAILWAY COMPANY.

[U.S. Rep.]

does not mean "manufactured lumber" any more than "wool" means "cloth." There is a special section enacted to cover crime committed upon the manufactured article; why then should sec. 21 be held to apply to the raw material and to the manufactured article likewise? Another point raised by the defence is equally decisive. If sec. 21 could avail, the indictment should have used the words of the statute. A pile of boards may or may not be a pile of boards of wood. An innuendo cannot extend the meaning of the terms which precede it;— 2 Saunders on Pleading, 922; Archbold, 830. The forms given at the end of the Procedure Act of 1869 are most misleading, and their defects are well shown by Judge Taschereau in his second volume. The indictment is therefore quashed.

The prisoner was discharged upon motion to that effect.

UNITED STATES REPORTS.

MARYLAND COURT OF APPEALS.

SHORT V. BALTIMORE CITY PASSENGER RAILWAY COMPANY.

Removal of snow by Street Railway Company.

A street railway company having a franchise to operate its road on a city street has a right to remove the snow from its track, and place it upon another part of the street, and if it exercises ordinary care and prudence in doing these acts it will not be held liable for injury done to adjoining property by reason of such snow obstructing the flow of water in the street.

[*Albany Law Journal.*]

Appeal by plaintiff from a judgment in favour of the plaintiff. Sufficient facts appear in the opinion.

J. T. Mason, for appellant.

Arthur W. Machen, for respondent.

ROBINSON, J. The appellant is the owner of a house in the city of Baltimore, on Hoffman Street, near its intersection with Gay; and the appellee is the owner of a horse railway, running along the bed of Gay Street, and across Hoffman.

On the 6th January, 1877, there was a heavy fall of snow, and in clearing its track, it is alleged the appellee threw the snow off

toward the curb, making a ridge or bank on Gay Street, and across the mouth of Hoffman, thereby obstructing the natural flow of water at the intersection of the two streets.

On the other hand, the appellee proved that the snow which had been pushed off the track by the snow-plough lay between the track and the gutter, and did not obstruct nor in any manner interfere with the natural flow of water from Hoffman Street.

On the night of the day in question it rained very hard, and the appellant's house was flooded with water, and this suit is brought to recover damages for injuries thereby sustained.

At the trial below, the appellant asked the court to instruct the jury: that if they should find the appellee obstructed the natural flow of water from Hoffman Street, and that by reason of said obstruction the house of the appellant was flooded with water, he was entitled to recover damages for the injuries thereby sustained.

This instruction the court granted, subject, however, to the following modification:—

"That if the jury should find the appellee exercised ordinary care in the management of its track on Gay Street, and removal of the snow therefrom, and clearing out the gutter extending along Gay Street at the side of its track, and that the damage suffered by the plaintiff was attributable either to the conformation of the ground and situation of his premises, or to a storm of such extraordinary severity that the usual drainage provided by the city would not carry the water off, then their verdict should be for the defendant."

The appellant contends that he was entitled to the instruction as offered by him, and that the court erred in granting it with the qualification.

Assuming, then, that the snow, thrown on the street by the appellee in clearing off its track, obstructed the natural flow of water from the street; and that in consequence thereof the appellant's house was injured, the broad question is presented, whether he is entitled to recover damages irrespective of the question of negligence on the part of the railway company!

As a general rule, it is conceded that every

U.S. Rep.]

SHORT V. BALTIMORE CITY PASSENGER RAILWAY COMPANY.

[U.S. Rep.]

one must so use his own property, and exercise the rights incident thereto, in such a manner as not to injure the property of another. And it is equally true, that the *mere lawfulness of the act* is not in itself a test in all cases of exemption from liability for injuries resulting therefrom to the property of others. But yet there are certain rights incident to the dominion and ownership of property, in the exercise and enjoyment of which a person will not be liable for damages, although injury may be occasioned thereby to the property of another.

The books are full of cases of this kind and it is unnecessary to cite them here. The question, then, is, what is the true test in actions of this kind, by which the *exemption from liability is to be determined*? We think it may be safely said, both on principle and on authority, that the true test is, whether, in the act complained of, the owner has used his property in a *reasonable, usual and proper manner*, taking care to avoid unnecessary injury to others.

This is the rule laid down by the House of Lords, in the recent case of *Rylands v. Fletcher*, L. R., 3 Eng. and Ir. App. 330. There the defendant built a reservoir for the purpose of keeping and storing water, and the weight of the water broke through some old disused mining passages and works and injured the mine of the plaintiff.

The Court of Exchequer, Bramwell, B., dissenting, were of opinion that the plaintiff was not entitled to recover; but on appeal to the Exchequer Chamber, this judgment was reversed; and on appeal to the House of Lords, the judgment of the Exchequer Chamber was affirmed.

The Lord Chancellor said:—"The defendants, treating them as the owners or occupiers of the close in which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used: and if in what I may term the natural user of that land, there had been any accumulation of water either on the surface of the ground, or under water, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plain-

tiff could not have complained that that result had taken place.

"On the other hand, if the defendants not stopping at the natural use of their close had desired to use it for any purpose which I may term a *non-natural* use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water, either above or below ground, in quantities and in the manner not the result of any work or operation on or under the land, and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me, that which the defendants were doing, they were doing at their own peril."

The right of the plaintiffs to maintain their action was based entirely upon the ground that the defendants had used their land in an unusual, or, in the language of the Lord Chancellor, in a "*non-natural*" manner, but the right to use it for any purpose for which it might, in the ordinary course of the enjoyment of land be used, was distinctly asserted.

Now in this case the appellee was entitled under its charter and the ordinances of the city of Baltimore to the use of the bed of the street for the purpose of a horse railway, and if its track was obstructed by snow, it had beyond all question the right to remove it. And the only question is, whether in clearing its track, and in throwing the snow on the bed of the street adjoining thereto, it can be said that the appellee was, under the circumstances, using the bed of the street in an *unusual or unreasonable manner*. We think not. The removal of the snow from its track being necessary in order to enable the company to use it for the public benefit and conveyance, it was obliged either to throw it on the bed of the street or to haul it away, and no one will pretend that it was under any obligation to do the latter. It had no right, of course, to throw the snow in the gutter, and thereby obstruct the natural flow of water from the street, because in so doing the appellee would have been guilty of negligence. Nor are we to

CORRESPONDENCE.

be understood as deciding that the railway company had the right to bank up the snow on Gay street so as to necessarily obstruct the natural flow of water. On the contrary, it was obliged to *exercise ordinary care and prudence*, not only in removing the snow from its track, but also in throwing it on the street. And this question was distinctly left to the jury by the modification of the plaintiff's prayer.

Nor do we agree with the appellant that the evidence was legally insufficient to prove either that the storm was one of unusual severity, or that the flooding of the plaintiff's house was owing to the peculiar conformation of the ground.

On the contrary, the appellant's own witness, Martinet, says, "it was a dreadful night—slush and snow ankle deep—one of the worst nights he ever knew."

Then as to the peculiar conformation of the ground, the proof shows that the first story of the plaintiff's house is several feet below the level of the street, and there was evidence tending to show that it was liable to be flooded from several directions, namely, through Reaney's house on the west, and then from the rear of the house, by the water coming down the hill-side of south of Hoffman Street, and lastly by the overflow of the front sidewalk, caused by the choking up of the Hoffman Street gutter.

The several instructions granted by the court presented, we think, the law of the case fairly to the jury, and the judgment below must therefore be affirmed.

Judgment affirmed.

Alvey, J., dissented.

CORRESPONDENCE.

Master and Servant Act, c. 133, R. S. O.

To the Editor of the LAW JOURNAL.

SIR,—In case the Court appealed to sustains an appeal under sec. 13, and quashes the conviction, has it power to order payment of costs against respondent?

If not, should not the law be reformed?

Yours,

SUBSCRIBER.

Invermay, Aug. 23rd, 1880.

[We are inclined to think that there is no power to award costs in such a case. The Act is silent on the point. The respondent would seldom be a person against whom an order for costs would be of much value.]

The subject is touched upon in O'Brien's D. C. Manual, 1880. Eds. L. J.].

Impudent Invaders.

To the Editor of THE LAW JOURNAL.

SIR,—I notice in your August issue a card, furnished you by a correspondent, of a "conveyancer" whose talents are not confined to that occupation. I find the following in a local paper:

AUCTIONEER, COMMISSIONER,
CONVEYANCER, &c.

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Aurora, Aug. 6th, 79.

Notary Public.

Though we are agreed on principle that the practice of conveyancing should be confined to the legal profession, would it not be tyrannous to crush men who have the rare and versatile genius of the foregoing advertisers.

I remain

Yours &c.,
A.

[We have no doubt the Benchers will agree with our correspondent. They will probably now abandon the superhuman

LAW STUDENTS' DEPARTMENT.

efforts they have hitherto made to protect their country brethren. For fear, however, that any reader should be unfamiliar with this subject, we would add, in the words of the poet "N.B. Th's is sarkastikul."—Ed. L.J.]

LAW STUDENTS' DEPARTMENT.

The following is the result of the recent Law Society examination for call and admission :—

BARRISTERS.

W. H. P. Clement, J. E. Lees, W. H. Biggar, R. W. Wilson, E. Mahon (without an oral on the merits); J. R. Brown, J. S. Hough, M. A. McHugh, J. J. Blake, W. G. Eakins, W. B. Ellison and W. P. McPhillips (equal), S. C. Elliott, C. E. Hewson, A. H. Leith and E. Morgan.

ATTORNEYS.

W. H. Biggar, J. E. Lees and R. W. Wilson (equal); W. H. P. Clement, W. B. Ellison, S. C. Elliott (without an oral on the merits); R. Miller, J. R. Brown, G. Gibson, J. H. Scott, F. B. Robertson, A. H. Manning, J. N. Muir, P. McPhillips, A. McNabb, N. Gilbert, C. E. Freeman, J. B. O'Flynn, and H. W. Hall.

The following questions are taken from the *English Bar Examination Journal* :

Real and Personal Property.

Q. 1.—How far, if at all, can a married woman make a valid will?

Q. 2.—Tenant in fee of some, and in tail male in possession of other common socage and gavelkind lands, died, in 1870, intestate, leaving a widow and the following issue :—Two daughters of his deceased eldest son, two sons, and the only son of a deceased daughter. Who are entitled to the lands respectively and for what estates and interests?

Q. 3.—A testator bequeathed a leasehold house to A., and appointed B. his executor. A. has agreed to sell the house to C., and B. has agreed to sell it to D. Which contract can be enforced, and what compensa-

tion, if any, can the disappointed purchaser obtain?

Q. 4.—Land stands limited to A., a married woman, for her life for her separate use, remainder to her son B. in tail male, with power for her to appoint by will a life interest to any husband who may survive her. B. is of age, and has issue only a daughter. Can a good present title be made to a purchaser, and if so, by what means?

Q. 5.—What is meant by a tenant in tail after possibility of issue extinct? Can he, and how, bar his estate tail with or without the subsequent remainders?

Q. 6.—Mortgagor and mortgagee of freeholds and leaseholds, the leaseholds being mortgaged by demise, have sold the whole property. Briefly sketch the conveyance.

Q. 7.—An immediate legacy was bequeathed to a woman who was married at the testator's death; her husband assigned it to a purchaser for valuable consideration, and died. The executor being now ready to pay the legacy, it is claimed by the woman, and also by the purchaser. To which of them must it be paid?

Q. 8.—What difference is there between copyholds and customary freeholds? To whom, in each case, do the minerals belong, and what rights has the owner of getting them?

Q. 9.—A married woman is entitled, under a will made in 1857, to a leasehold house, subject to an existing life estate therein. She and her husband have agreed to sell the reversionary interest, which is not settled to her separate use. Advise the purchaser if they can make an effectual conveyance, and how?

Q. 10.—If land is conveyed by deed to A., habendum to A., to the use of B., his heirs and assigns, and A. dies, what happens?

Equity.

ADMINISTRATION.

Q. 1.—What is the provision in the Statute of Distributions respecting "advancement by portion"? What is the meaning of this term? Illustrate your answer by examples.

Q. 2.—Explain the term "marshalling assets." How does it differ from "marshalling securities"? Give instances of each.

LAW SOCIETY, EASTER TERM.



Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 43RD VICTORIÆ.

During this Term, the following gentlemen were called to the Bar. The names are placed in the order in which they stand on the Roll of the Society, and not in the order of merit.

SAMUEL SKEFFINGTON ROBINSON.
ALEXANDER GRANT.
JOSEPH BOOMER WALKER.
EBENEZER FORSYTH BLACKIE JOHNSTONE.
FRANK FITZGERALD.
GEORGE A. F. ANDREWS.
THOMAS STEWART.
HENRY SCHUYLER LEMON.
JAMES HENDERSON SCOTT.
EUGENE DE BEAUVOIR CAREY.
GIDEON DELAHAY.
GERALD FRANCIS BROPHY.
WILLIAM HENRY DEACON.
ROBERT W. SHANNON.
DANIEL McLEAN.
ARTHUR WILLIAM GUNDRY.
JOHN NICHOLSON MUIR.
JOHN BROWN McLAREN.

On the 19th May the following gentlemen were admitted as Students-at-Law and Articled Clerks, namely :—

Graduates.

ROBERT PEEL ECHLIN.
WILLIAM HENRY WILBERFORCE DALRY.

Matriculants.

ALEXANDER B. SHAW.
LEONARD HUGH PATTEN.

Junior Class.

DOUGLAS ALEXANDER.
PAUL KINGSTON.
THEOPHILUS BENNETT.
EDWARD W. J. OWENS.
ALBERT J. FLINT.
DONALD MACDONALD.

Articled Clerk.

WILLIAM DUNCAN SCOTT.

And on the 22nd May the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

C. H. IVEY.
CHARLES R. IRVING.
RICHARD WALLACE ARMSTRONG.

By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

RULES AS TO BOOKS AND SUBJECTS
FOR EXAMINATIONS, AS VARIED
IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, *Fasti*, B. I., vv. 1-300; or,
Virgil, *Æneid*, B. II., vv. 1-317.
Arithmetic.
Euclid, Bs. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

Students-at-Law

CLASSICS.

1880 { Xenophon, *Anabasis*, B. II.
Homer, *Iliad*, B. IV.
1880 { Cicero, in *Catilinam*, II., III., and IV.
Virgil, *Eclog.*, I., IV., VI., VII., IX.
Ovid, *Fasti*, B. I., vv. 1-300.
1881 { Xenophon, *Anabasis*, B. V.
Homer, *Iliad*, B. IV.
1881 { Cicero, in *Catilinam*, II., III., and IV.
Ovid, *Fasti*, B. I., vv. 1-300.
Virgil, *Æneid*, B. I., vv. 1-304.
Translation from English into Latin Prose.
Paper on Latin Grammar, on which special stress will be laid.

DIARY—CONTENTS—EDITORIAL NOTES.

DIARY FOR OCTOBER.

2. Sat. ...Prince Arthur visited Toronto.
3. Sun. ...Nineteenth Sunday after Trinity.
4. Mon...County Court Terms and sittings without jury (ex. York) begin.
8. Fri. ...Harrison, C. J., sworn in, 1875.
9. Sat. ...County Court Term ends. T. Moss sworn in Judge Court of Appeal, 1875.
10. Sun. ...Twentieth Sunday after Trinity.
11. Mon...County Court Term for York begins. Gay Carleton, Governor of Canada, 1774.
12. Tues...Lord Lyndhurst died, 1865.
13. Wed...Battle of Queenston, 1812.
16. Sat. ...County Court Term for York ends.
17. Sun. ...Twenty-first Sunday after Trinity.
21. Thur...Battle of Trafalgar, 1805.
23. Sat. ...Lord Monck, Governor-General, 1861.
24. Sun. ... Twenty-second Sunday after Trinity.
25. Mon...Battle of Balacava, 1854.
26. Tues...Supreme Court sittings.
31. Sun. ...Twenty-third Sunday after Trinity. All Hallow Eve.

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Canada Law Journal.

Toronto, October, 1880.

We received some time ago a budget of papers from British Columbia, containing the report of a case which shows an unsatisfactory relationship between the Bench and some members of the Bar. It would not be worth while to discuss the rights and wrongs of the conflict, and it is impossible to form any accurate opinion on such matters from a newspaper report, but we trust that long before this their feelings may have become as pacific as their ocean.

In a late trade-mark-case, *Re Worthington and Co.'s Trade Mark*, 28 W. R. 747, Lord Justice James, with somewhat questionable taste, referred to the device "which, we are told, happened to the signature of the great Lord Protector of this country—that the Oliver was getting to be written very large, and the Cromwell was getting to be written very small, so that Mr. Cromwell was disappearing in the quasi-royal Oliver."

A correspondent makes enquiries as to the new Digest. We are told that it will be finished in about two months' time. The first part of the Supplement, or Addenda, has already been issued, and shows that it includes all volumes now complete. The *modus operandi* has been to insert, under the title appearing in each number, all the cases published up to the time of its issue. The Addenda takes up the rest of the cases, and so brings the work down to a defined and to the latest period. It is a most laborious work, invaluable to the profession, and reflects the greatest credit upon the compilers.

EDITORIAL NOTES.

The preference for common law over the doctrines of Equity survives very strongly in Bramwell, L.J., notwithstanding the provisions of the Judicature Act giving priority to the latter when they conflict with the decisions at law. In *Greaves v. Topfield*, 28 W. R. 845, he ends his judgment with these words, uttered more in sorrow than in anger, we suppose: "I do not know whether I have grasped the doctrines of equity correctly in this matter, but if I have, they seem to me to be—as a good many others of them are—the result of a disregard of general principles and general rules, in the endeavour to do justice more or less fantastically in certain particular cases."

Cases have come under the observations of most practitioners where very great carelessness has been exhibited by commissioners and others in the administration of oaths to, and in the attestation of the signatures of, illiterate persons. Very often a solicitor signs as witness to the execution of a conveyance by a marksman, and appends the information that the document was read over and explained. And very often this statement is illusory and untrue. A note of warning comes, in regard to such loose practices, from a late decision in England. In *Ex parte National Mercantile Bank*, 28 W. R. 848, it was intimated that should a solicitor attest that he had given an explanation of a bill of sale, when he had not, he might be liable to be struck off the roll.

The scheme for the additions to Os-
goode Hall is assuming a definite shape,
and only awaits the result of a conference
between the Society and the Government
as to the exact location of the new building
before the work begins. This building is to
be about eighty feet long by forty wide
and fifty-six feet high, and is to be erected

somewhere in the rear of the present
easterly wing. It is to be devoted partly
to a Convocation Hall, to be used also
for examinations, sixty-five feet long, by
forty wide and thirty-six feet high, whilst
underneath there will be a dining-room,
with lavatory and kitchen. There will
be also rooms for examiners and students,
and the two easterly rooms of the pres-
ent wing will be made into one, and used
as a sort of miscellaneous library. It
is expected that the cost of the new
building will be about \$25,000.

Lord Justice Bramwell has lately
been taking our English namesake to
task for some comments on a letter in
that journal, in which the writer took
exception to certain remarks of the Lord
Justice. It is, of course, quite compe-
tent for a Judge to uphold his views by
letters to the press; but we doubt the
expediency of so doing, even though he
speaks through the columns of a legal
journal. It tends to unseemliness. In
the present case the learned Judge felt
compelled to characterize the language of
his critic as neither modest nor becoming.
The editor of the *Law Journal* says,
"there was no intentional disrespect,"
and adds as an excuse, "It is difficult
for a writer to be always strictly modest
and becoming without being flat." We
think it would have been well if the
editor had left this unsaid, and the
Judge his letter unwritten.

THE DOMINION AND THE EMPIRE.

(Continued.)

II.

Colonial Governor, Colonial Parliament, who-
ever or whatever does an injustice or resolves
on an unwisdom, he is the pernicious object, how-
ever parliamentary he be!—*Thomas Carlyle*.

Pursuant to the intention indicated at

THE DOMINION AND THE EMPIRE.

the conclusion of our first article, we propose now to lay before our readers, in some detail, Mr. Todd's views, as contained in his recent work on *Parliamentary Government in the British Colonies*, of the actual position of the Sovereign in connection with parliamentary institutions in the mother country, and of the corresponding position and functions of a constitutional Governor in self-governing communities within the limits of the British Empire. The method we propose adopting in doing this may not be very ambitious, but is, as it appears to us, best calculated to be of service to our readers. We propose by collating passages from various portions of the book, to set forth in a more or less connected form, the leading points of Mr. Todd's constitutional doctrine.

At p. 430 occurs a passage which might be taken as the text on which all that large portion of the work which deals with the subject now under review, might be made to hang.

"The British Government is a limited monarchy, wherein the Sovereign has certain constitutional rights and a defined position.

"In the substantial reproduction in a British colony of the Imperial polity, the Governor must be regarded not merely as the representative of the Crown in matters of Imperial obligation, but as the embodiment of the monarchical element in the colonial system, and the source of all executive authority therein.

"Our colonial institutions, derived from and identical in principle with those of the mother country, are essentially monarchical, and whatsoever duties or rights appertain to the Crown in the one are equally appropriate and obligatory in the other. In the constitutional monarchy of Great Britain, there is no opportunity or justification for the exercise of personal government by prerogative. The Crown must always act through advisers, approved of Parliament, and their policy must always be in harmony with the sentiments of the majority in the popular chamber. With this important limitation, however, the British monarch occupies a position of authority and influence, and is a weighty factor in the direction of public affairs; exercising his high trust

for the welfare of the people, and as the guardian of their political liberties."

Nor, as Mr. Todd points out (p. 28), does the importance of a correct appreciation of the true constitutional position of the Sovereign, or his representative, depend upon the greater or less control exercised by the Imperial Government over the colonies, or indeed upon the continuance of British connection at all.

"The gradual relaxation, by the mother country, of the tie of political dependence on the central authority of the empire, in respect of any British colony, or even the actual sundering of connection between them, does not necessarily involve the overthrow or abandonment of the system of Parliamentary Government which after the model of the parent state, has been established therein. That system might be suitably retained, on account of its obvious advantages, long after the control of the mother country has been relaxed, or even withdrawn. . . . Even in the supposable case of the amicable separation of a colony from the parent state, the superior advantages of possessing institutions based upon the stable foundation of a limited monarchy, and similar in principle to those of England, would naturally induce the young community to retain, with as little alteration as possible, the most prominent features of a polity that has, for so many generations, preserved freedom without lawlessness to the British race."

We are reminded (p. 592) that:—

"In conferring 'responsible government' upon her colonies, it was the design of Great Britain to convey to them, as far as possible, a counterpart of her own institutions. By this system, it was intended that the vital elements of stability, impartiality, and an enlightened supervision over all public affairs should be secured as in the mother country, by the well-ordered supremacy of a constitutional Governor, responsible only to the Crown; whilst the freedom and intelligence of the people should be duly represented in the powers entrusted to an administration co-operating with the Crown in all acts of government, but likewise responsible to Parliament for the exercise of their authority."

And so, although the Governor of a colony is not a Viceroy, and unlimited sovereign authority is not delegated to him, yet (p. 33):—

THE DOMINION AND THE EMPIRE.

"Pursuant to his Commission and the accompanying instructions, he becomes within the limits assigned to him the embodiment and expression of the monarchical element in the colonial polity, so far as that element can find a constitutional channel for its exercise under parliamentary government. The office of Governor is as much a constitutional part of the constitution in every colony, as is that of either of the other branches of the local legislature."

We are told (p. 3), that the three leading maxims of the British Constitution, in its modern form and developments, are: the personal irresponsibility of the King; the responsibility of his Ministers for all acts of the Crown; and the inquisitorial power and ultimate control of Parliament. What position then, what rightful authority or influence does such a system as this concede to the Sovereign, or to a colonial Governor? That the Sovereign has become a cipher in the State,—“a dumb and senseless idol,” Mr. Todd emphatically denies.

“Such an assumption,” he says (p. 4), “would transform the Queen’s Cabinet Ministers into an oligarchy, exercising an uncontrolled power over the prerogatives of the Crown, and the administration of public affairs, upon the sole condition that they are to secure and retain a majority in the popular branch of the legislature, to approve their policy and to justify their continuance in office. . . . It is not a true representation of the British Constitution, and should it ever unhappily prevail, would deprive us of one of the main securities upon which the liberties of England depend.”

But if the Sovereign cannot be rightfully considered a mere ornamental appendage to the constitution—a view which we fully sympathise with Mr. Todd in indignantly repudiating—still less can a Governor be considered such. For a Governor holds a dual position. As pointed out by Mr. Herman Merivale, in a passage in his famous *Lectures on Colonization and Colonies*, quoted by Mr. Todd (p. 577), as regards the internal administration of his government, he is merely a constitutional sovereign acting through his advisers, but whenever any

question is agitated touching the interests of the mother country his functions as an independent officer are called at once into play. And the same distinction is clearly pointed out by Mr. Todd (pp. 458-459), and by Lord Mulgrave in a despatch written by him when Lieutenant-Governor of Nova Scotia in 1860; and quoted by Mr. Todd at p. 537. The position, however, of a colonial Governor, is so strikingly set forth by Mr. Merivale in another part of his above-named work, and quoted by our author at p. 577, that we cannot refrain from giving it in full:

“Under responsible government a Governor becomes the image in little of a constitutional king, introducing measures to the legislature, conducting the executive, distributing patronage, in name only, while all these functions are in reality performed by his councillors. And it is a common supposition that his office is consequently become one of parade and sentiment only. There cannot be a greater error. The functions of a colonial Governor under responsible government are (occasionally) arduous and difficult in the extreme. Even in the domestic politics of the colony, his influence as a mediator between extreme parties and controller of extreme resolutions, as an independent and dispassionate adviser, is far from inconsiderable, however cautiously it may be exercised. But the really onerous part of his duty consists in watching that portion of colonial politics which touches on the connection with the mother country. Here he has to reconcile, as well as he can, his double function as Governor, responsible to the Crown, and as a constitutional head of an executive controlled by his advisers. He has to watch and control, as best he may, those attempted infringements of the recognised principles of the connection which carelessness or ignorance, or deliberate intention or mere love of popularity, may from time to time originate. And this duty of peculiar nicety, he must perform alone. . . . His responsible Ministers may (and probably will) entertain views quite different from his own. And the temptation to surround himself with a *camarilla* of special advisers, distinct from these Ministers, is one which a governor must carefully resist. It may, therefore, be readily inferred, that to execute the office well requires no common abilities, and I must add that the occasion has called forth these abilities.”

The lawful authority of the Crown in connection with parliamentary govern-

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ment, Mr. Todd declares (p. 459) to be essential to the efficiency and stability of parliamentary institutions; and he enforces this remark in a striking manner by a reference to the American constitution. He says:—

"The framers of the American constitution deemed it necessary in the interest of the nation to entrust large powers to the President, including a right to veto the legislation of Congress, unless, upon reconsideration, two-thirds of both Houses should require the passing of a measure of which the President had disapproved.

"In view of the more extended powers which are practically confided to a parliamentary ministry able to command a majority in the popular chamber, it is evident that some restraint upon their actions is needful to counteract possible corruption or abuse. This restraint is afforded by the vigilant oversight of the sovereign or her representative."

And he goes on to remark that in a British colony the representative of the Crown is usually a man of special qualifications for his exalted office.

But notwithstanding the importance of maintaining the lawful authority of the Sovereign, Mr. Todd warns us (p. 19) that:—

"Practically, ever since the commencement of the Reform movement, in 1830, the constitutional monarchy of England has been in danger, through the onward progress of democratic ideas, of being converted into a purely ministerial oligarchy; to the detriment not only of the personal rights of the Crown in the body politic, but also of those vital interests therein which are of national concern, and which it is the peculiar province of the sovereign to conserve."

And there is a further circumstance pointed out by Mr. Todd, besides the progress of democratic ideas, which renders it the more difficult for the proper constitutional value of the Crown to be appreciated. He remarks (p. 23) that—

"From the secrecy which properly enshrines the intercourse between the Crown and its advisers, it rarely happens that the opinions or conduct of the sovereign in governmental matters becomes known to the public at large. Accordingly, those functions of the Crown which are most beneficial in their operation are apt to be

undervalued; because, whilst strictly constitutional, they are hidden from the public eye."

What these functions are, in the view of the author, we propose now to set out somewhat more specifically; and we would desire, if space allows, to add some remarks upon Imperial control over self-governing Colonies generally.

(To be continued.)

ENFORCEMENT OF MARRIED WOMAN'S CONTRACT REGARDING HER RIGHT TO DOWER.

A new point in the law regarding married women has been decided by Vice-Chancellor Proudfoot in the case of *Loughead v. Stubbs*, 27 Grant, 387. But we are inclined to think that it was not so fully argued or so maturely considered in some respects as its importance demands. The husband was the owner of land, his wife having an inchoate right of dower therein, and he and she both entered into an agreement in writing to sell the land to the plaintiff for a price less than the amount of incumbrances. The excess of such incumbrances the husband was to pay and he was to convey in fee free of all liens or charges. The purchaser filed his bill against the husband alone, praying for specific performance, and the defendant demurred on the ground that his wife was a necessary party defendant. The date of the transaction was in February, 1880; the date of the marriage is not given. The Judge held, that as the husband did not alone contract to sell, but united with his wife in the agreement, it was a joint agreement to convey, and that all parties liable to convey must be joined; and that the husband should not be put to the risk of having to abate the purchase money, and therefore his wife should be a defendant. On these grounds the demurrer was allowed.

ENFORCEMENT OF MARRIED WOMAN'S CONTRACT REGARDING HER RIGHT TO DOWER.

The Vice-Chancellor distinguished the case from *Van Norman v. Beaupré*, 5 Gr. 599, where the husband alone had made the agreement, and it was held, that if he could not procure his wife to join in the conveyance, he would have to suffer an abatement of the purchase money. This was indeed clearly laid down by Esten, V. C., in an earlier case of *Kendrew v. Shewan*, 4 Gr. 578, where it was held (as stated in the head note) if a party agrees to convey property he is bound to do so free from dower; or if the wife will not release her dower, then to convey subject thereto, with abatement of the purchase money.

But the question of the wife's competency to contract was that which seems to have been overlooked in the case of *Loughhead v. Stubbs*. *Castle v. Wilkinson*, L. R. 5, Ch. 534, is much more in point than any of the cases cited in the report. There a husband and wife had agreed to sell the wife's estate. She refused to convey, and the purchaser filed his bill asking that the husband should convey and accept a reduced price. But this was refused and Lord Hatherley said, "on the face of the agreement the husband and wife intended to sell and the purchaser knew that he was contracting with them for the estate of the wife, and that he could only get what the wife was willing to convey." So in the case we are considering, the purchaser and the husband knew that the right to dower could be transferred only if the wife was willing to join in the conveyance. Could the Court, even if she were joined as a defendant, compel her to execute the conveyance? As the case stands it would suggest an affirmative answer.

No reference is made to the statutory law relating to married women, and it is impossible to say how far the attention of the Judge was directed to this aspect of the case. If the wife of the defendant was still under common law disabilities, it is clear that she could not bind herself

by signing the agreement to convey her interest, and that specific performance could not be enforced against her. This is the law even if a married woman acts as a trustee in making the contract: *Avery v. Griffin*, L. R. 6 Eq. 606 (where she was a devisee in trust to sell the property).

But if the defendant's wife was within the scope of the enabling statutes then her inchoate right of dower can not be regarded as her separate estate nor was it such an estate or interest in possession as was contemplated by the Married Woman's Property Act of 1872. Upon these points the case in appeal of the *Standard Bank v. Boulton*, 3 App. R. 93, demands an attentive consideration. See also *Britton v. Knight*, 29 C. P. 567.

It may be argued, that since the Revised Statutes a different interpretation would be given to the clause of that Act which was under discussion and was there adjudicated upon by the Court of Appeal. For this reason, that whereas in the original Act the words "any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*," formed the concluding clause of the first section, the whole of which was in the form of a single sentence—these words are now isolated and appear in an independent section in Rev. Stat., cap. 125, sec. 19, p. 1167. The Chief Justice was evidently influenced by the collocation of the clause and thought that the expression "real estate" should receive the same construction (*i. e.* as meaning *separate* real estate) throughout the section. But having regard to 40 Vict., c. 6, s. 10 (Ont.), it is likely that no different holding would result from the severance of the clause from its former context.

The later English authorities indicate a growing disposition to extend the liabilities of married women, and no doubt

ENFORCEMENT OF MARRIED WOMAN'S CONTRACT—BENCH AND BAR.

foreshadow legislative changes in that direction. Thus Vice-Chancellor Malins in an elaborate judgment in *Pike v. Fitzgibbon*, 28 W. R. 667, decided that the written engagement of a married woman binds all separate estate belonging to her at the date of the judgment in the action, whether it belonged to her at the time of the engagement or was afterwards acquired; that it was immaterial whether or not she had any such estate at the time of the engagement; and moreover that such property was bound, even if it was originally subject to restraint on anticipation, provided that before the judgment the restraint had become inoperative by the death of husband. And the still later case of *Flower v. Buller*, 28 W. R. 948, extends the doctrine of *Pike v. Fitzgibbon*, and decides that a married woman may bind her separate estate in *expectancy* under a will by charging it in writing (her husband also joining) for advances made to the husband; and this although the estate in expectancy was one under the will of a living person. Some of the positions advanced by Denman, J., (who sat for Fry, J.) appear to be, but are not necessarily, at conflict with views enunciated in some parts of the judgments in *The Standard Bank v. Boulton*. But we are not aware of any authority going so far as the decision in *Loughead v. Stubbs*, touching the liability of a married woman on a contract respecting her real estate, or her interests in expectancy therein.

BENCH AND BAR.

The question has been raised in England as to the propriety of a judge's son practising in his father's Court. The *Law Times* thus alludes to the subject:

"An incident in the [Bristol] County Court raises a question which, we think, is of the utmost moment to the Bench and the Bar. A son of the judge appeared as counsel before him, and

the counsel on the other side declined to go on with the case, as we gather, on that ground alone. We think the judge was wrong in suggesting that this step could in any sense be an insult to him. It is in the highest degree inconvenient, in cases where a judge sits to try cases alone, that his son should practise before him. This view has been taken very strongly by Sir James Hannen. That it has not been taken by Sir R. Phillimore has caused much soreness and adverse comment. The ground upon which we agree with the objecting counsel at Bristol is, that it is quite impossible for a judge under such circumstances to escape the criticisms of suitors who are defeated before him when opposed by his son. They may be unfair, but they will be made, and the consequences must be most prejudicial to the administration of the law. County Court judges are not just now so favourably regarded that they can allow their Courts to be made the means of advancing their relations, and they should discourage solicitors in their districts from retaining the services of those intimately connected. We do not agree that there is any analogy between practising in County Courts and at assizes. To say that a barrister should never appear in a court presided over by his father may be unreasonable. But we most emphatically condemn the practice of barristers adopting a court in which to practise over which their fathers do preside or may preside alone."

The *English Law Journal* takes similar ground:—

"There is, no doubt, an impression abroad that the judge is likely to turn a more favourable ear to the arguments of his son than to those of other advocates. In the United States the impression has taken so deep a hold that an attempt has actually been made to pronounce a father disqualified, on the ground of interest, to try a case in which his son is engaged. Such views of the situation are, it is needless to say, altogether without foundation. Judge's sons cannot be estranged from the bar because their fathers were eminent lawyers before them. We do not for a moment believe that a single case on record has been decided in favour of a particular party because that party happened to be represented by the judge's son.

When so much is said, the subject however, is not exhausted. It is a great deal more likely that judges will take a sort of malicious pleasure in non-suited their sons than put themselves out of the way to help a son's client over a stile. The very feeling that he may be supposed to be influenced will, in a refined nature, if it produces a bias at all, turn it against the object that it is expected to favour. Lord Blackburn once said that the Chief Justice, having tried and

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convicted Orton, was more likely to be afterwards prejudiced in his favour than against him. There is in most natures much of the feeling of the schoolmaster who thrashed his son in the presence of the other pupils every morning to show his impartiality. It is not so much the actual influence that has to be dealt with as the appearance of influence. This appearance is not of sufficient importance to be taken into account in ordinary cases; but still, if a son attach himself constantly to the court of his father as a Queen's counsel, in equity attaches himself to a Vice-Chancellor, it must be admitted that an impropriety is committed.

The etiquette of the Bar on this and kindred subjects was originally clear enough; but of late years a loose practice has prevailed. Formerly, it was a strict rule that no son should join the circuit of which his father was a leader. This rule was infringed noticeably, some years ago, on the Norfolk Circuit; and it can no longer be said to be a strict rule. The subject now in question stands on much higher ground, as it deals, not merely with professional interests, but with possible influences in the court. The principle applicable to such cases is plain—namely, that no member of the Bar ought to put himself in such a situation that there is even the appearance of his obtaining business because he is supposed to exercise an undue influence over the court."

The *Albany Law Journal* says:—

"The difficulty in the case is four-fold; first, that the judge will always be presumed by the populace to lean in favour of his son; second, that the son will get business from the force of this presumption; third, that the judge will unconsciously be biased in his favour; or fourth, that the judge will do his son's client injustice from the fear of such bias. However pure, the judge and his son will always stand in danger. We think it would be better for everybody that a judge should decline to hear a cause in which his son is counsel or attorney."

There seems a great unanimity on this subject in the legal press. The remarks above quoted seem to us to lay down the true principle. In this Province, the evil cannot exist to any extent in connection with practice in the Superior Courts. An occasional unpleasantness has, however, arisen in one or more of the county towns in Ontario, and a correspondent has recently called our attention to a case in point, to which it may hereafter be neces-

sary to refer; but so far, there has been nothing of sufficient importance to draw general attention to the subject.

LAW SOCIETY.

TRINITY TERM, 44TH VICTORIA.

The following is the *résumé* of the proceedings of the Benchers during this term, published by authority:

Monday, 23rd August, 1890.

Present:—The Treasurer, and Messrs. Crickmore, McMichael, Bethune, Pardee, Kerr, Irving, and Mackelcan.

The minutes of last meeting were read and approved.

The Report of the Examiners on the examination for Call was received and read.

The Report of the Secretary as to the Papers of the Candidates was read.

Ordered that Messrs. W. H. P. Clement, J. E. Lees, W. H. Biggar, R. W. Wilson, J. R. Brown, J. S. Hough, M. A. McHugh, J. J. Blake, W. G. Eakins, W. B. Ellison, S. C. Elliott, O. E. Henson, and E. Morgan be called to the Bar.

The Report of the Examiners on the Examination of the Candidates for Certificates of Fitness was received and read.

The Report of the Secretary on the Papers of the Candidates was read.

Ordered that Messrs. W. H. Biggar, J. E. Lees, W. H. P. Clement, W. B. Ellison, S. C. Elliott, R. Miller, J. R. Brown, J. H. Scott, J. N. Muir, P. McPhillips, N. Gilbert, C. H. Freeman, J. B. O'Flynn, and H. W. Hall do receive their Certificates of Fitness.

Ordered that the cases of Messrs. Wilson, Gibson, Manning, and McNab be referred to the Legal Education Committee for report.

The Reports of the Examiners and Secretary on the First Intermediate Examination were received and read.

Ordered that the examinations of Messrs. Mahoney, Mulligan, Fraser, Canniff, Howard, Chapple, Reid, Johnston, Start, Anderson, Rattan, Elliott, Foulda, Yarnold, McFadden, O'Meara, Monk, Murchison, Tho-

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mas, Hamilton, Peterson, Hart, Holmes, Hammond, Daley, Wright; Martin, Culham, Kilgour, Barry, Rowe, be allowed them as students and articled clerks.

The Reports of the Examiners and Secretary on the Second Intermediate Examination were received and read.

Ordered that the examinations of Messrs. Beynon, Leonard, S. Wood, Mills, Russell, Adair, Haney, Snider, Knight, Smith, Gould, McCrimmon, Pringle, Lynch, McArdle, John Wood, Waddell, Lewis, Wilkes, Chisholm, Phillips, Howell, Sparham, Cooper, Dean, Sinclair, J. A. Wood, and T. G. Rothwell be allowed them as students and articled clerks.

The petition of Mr. Joshua Adams, praying for his call to the Bar under the rules in Special Cases, was received and read.

The Secretary reported that his papers were correct and his fees paid.

Mr. Bethune moved that Messrs. Crickmore, Kerr and Bethune be appointed a Committee to examine and report upon the papers of the candidates, and to conduct the examination under the rules.—Carried.

The petition of Mr. R. S. Gurd, praying for his call to the Bar under the rules in Special Cases, was received and read.

The Secretary reported that his papers were correct and his fees paid.

Mr. Bethune moved that Messrs. Crickmore, Kerr, and Bethune be appointed a Committee to examine and report upon the papers of the candidate, and to conduct examination under the rules.—Carried.

The petition of Mr. F. Beverly Robertson, praying to be admitted as an Attorney under the rules in Special Cases, was received and read.

Mr. Crickmore moved that the petition of Mr. Robertson be referred to the Legal Education Committee, to report as to his right to a Certificate of Fitness.—Carried.

Ordered that in case he be entitled he do pay the special fee under the rules as well as the ordinary fees.

The letter of Mr. Hutchison was received and read, announcing the dissolution of the partnership of Messrs. Rowse & Hutchison, and asking for the continued patronage of the Society.

Ordered that the third reading of Mr. Robertson's rule be postponed until the 24th inst.

The Report of the Legal Education Committee on the Primary Examinations was received and read.

Ordered that the following gentlemen be entered on the books as Students-at-Law, namely :—

Graduates.

Edward L. Curry, B.A., Cam.; Wm. Armstrong Stratton, B.A., Toronto; George Smith, M.A., Toronto; Alex. Sutherland, B.A., Toronto; Joseph Burr Tyrrell, B.A., Toronto; William J. James, B.A., Toronto; Thomas H. Gilmour, B.A., Toronto; Thomas V. Badgeley, B.A., Albert; Henry Lawrence Inglis, B.A., Trinity; James Burdett, B.A., Trinity; George Robson Coldwell, B.A., Trinity; Harcourt I. Bull, B.A., McGill; Isaac Norton Marshall, B.A., Toronto; Wellington Jeffers Peck, B.A., Victoria; Alvin I. Moore, B.A., Toronto; William A. Dowler, B.A., Victoria.

Matriculants.

G. H. Jarvis, Toronto University; Edmund J. Bristol, Toronto University; W. K. McDougall, Toronto University; A. H. Coleman, Toronto University; Archibald McKellar, Toronto University; Stephen O'Brien, Albert College; Harry Earl Burdett, Albert College; John Andrew Forin, Albert College.

Junior Class.

Messrs. Horace F. Jell, R. J. Dowdall, D. S. Kendall, G. F. Bell, A. C. McDonnell, O. L. Spencer, S. D. Biggar, H. A. Fairchild, George Craig, James Armstrong, A. McFadyen, W. A. J. G. Macdonald, C. M. B. Lawrence, C. N. Shanly, A. C. Steele, Gueret Wall.

Ordered, that the following candidates be allowed their examination as Articled Clerks :—

Messrs. D. Duncan, T. T. Young, M. Wilkins.

The following gentlemen were called to the Bar, namely :—

Messrs. W. H. P. Clement, W. H. Biggar, R. W. Wilson, M. A. McHugh, J. J. Blake, W. B. Ellison, C. E. Hewson, E. Morgan.

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Tuesday, August 24th, 1880.

Present : Messrs. Crickmore, Bethune, Kerr, Ferguson, Irving, Read, Mackelcan, McCarthy.

In the absence of the Treasurer, Mr. Irving was selected Chairman of Convocation. The minutes of last meeting were read.

The Report of the Special Committee on the cases of Messrs. R. S. Gurd, and Joshua Adams, was received, considered and adopted.

Ordered, that they be called to the Bar.

The Secretary reported that Messrs. Edward Mahon and Patrick McPhillips, had completed their papers.

Ordered, that they be called to the Bar.

The Chairman of the Legal Education Committee reported, that Messrs. R. W. Wilson and A. H. Manning, had completed their papers.

Ordered, that they receive their certificates of fitness.

The following gentlemen were called to the Bar, namely :—

Messrs. J. R. Brown, J. E. Lees, Joshua Adams, R. S. Gurd, E. Mahon, P. McPhillips, S. C. Elliott, W. H. Biggar, and J. S. Hough.

The third reading of Mr. Robertson's amended rule was ordered for Friday in September next.

The petition of Mr. John Canavan, for call to the Bar, under the rules for special cases, was referred to a special committee consisting of Messrs. Crickmore, Read and Bethune.

The petition of Charles Edward Irvine, was referred to Legal Education Committee.

The Secretary having reported that Mr. A. H. Leith's papers had been completed.

Ordered, that he be called to the Bar.

The following gentlemen, namely :—Mr. A. H. Leith, and Mr. W. G. Eakina, were called to the Bar.

The Legal Education Committee reported that Mr. Allan McNab, might receive his certificate of fitness, on showing either that he was serving Mr. Biggar from the 4th of September, to the 12th of October, with the leave of Mr. Frost, or that Mr. Biggar was the town agent of Mr. Frost.

Ordered accordingly.

Saturday, August 28th, 1880.

Present : The Treasurer, and Messrs. Crickmore, Reid, Bethune, McCarthy.

The minutes of last meeting were read and approved.

The Report of the Special Committee on the examination and papers of Mr. John Canavan, was also read and adopted.

Ordered that Mr. Canavan be called to the Bar.

Mr. Canavan presented himself and was called accordingly.

The petition of Mr. W. H. Beatty, praying for call under the rules in special cases was received, read and considered.

Mr. Read moved, that Messrs. Crickmore, Bethune and Kerr, be appointed a select Committee, to consider the petition, enquire into the regularity of the papers and conduct the examination of Mr. Beatty.

Convocation adjourned.

Friday, September 3rd, 1880.

Present : The Treasurer, and Messrs. Robertson, Irving, Henderson, Mackelcan, Read, Smith, Kerr, Ferguson, Crickmore, Bethune.

The minutes of last meeting were read and approved.

The Report of the Select Committee on the examination and papers of Mr. W. H. Beatty, who petitioned for call under the rules in special cases, was received, read and adopted.

Ordered that Mr. Beatty be called to the Bar.

Mr. Beatty presented himself, and was called accordingly.

The Secretary reported that Solomon G. McGill, who passed the second Intermediate Examination, but had by accident omitted to pay his fee and present his certificate, had now done so.

Ordered, that his examination be allowed as a Student and Articled Clerk.

The report of the Select Committee on the subject of Scholarships was received and read as follows :

REPORT.

The Select Committee appointed to consider and report a plan for establishing scholarships in connection with the Intermediate examinations with power to con-

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sider the expediency of abolishing the special scholarships beg leave to report as follows :

1. The number of persons who passed the Primary Examinations during the five years 1875 to 1879 inclusive, was 715, making an average of 143 per annum, of these, many dropped off during the course, insomuch that the average number called and admitted is estimated by the Secretary to be about one-half of those who entered, but of course the average number pursuing the course in each year is greater than one-half of the entrants and may be estimated at 100 at least in each year.

2. The object to be obtained is as far as possible to encourage and promote systematic and thorough study of the subjects for Examination.

3. The special scholarships which have for some years been granted have failed to accomplish this object. The candidates for these scholarships have numbered for the five years mentioned, as follows :

1875—For first year, 3 ; for second year, 4 ; for third year, 1 ; for fourth year, 1.—Total, 9.

1876—For first year, 4 ; for second year, 11 ; for third year, 4 ; for fourth year, 1.—Total, 20.

1877—For first year, 3 ; for second year, 3 ; for third year, 4 ; for fourth year, 2.—Total, 12.

1878—For first year, 4 ; for second year, 7 ; for third year, 4 ; for fourth year, 3.—Total, 18.

1879—For first year, 14 ; for second year, 3 ; for third year, 5 ; for fourth year, 2.—Total, 24.

These numbers are wholly insignificant when compared with the total number of students and even when compared with the number of meritorious and hard-working students for each year.

The failure may be ascribed to two causes first the difficulty of finding time to prepare for the special work, and secondly the well understood superiority of some one competitor for the single scholarship available for the year.

4. The Committee are of opinion that the special scholarships should be abolished ; and that honours and also three scholarships

should be established in connection with each intermediate examination, thus stimulating the student to greater exertion in mastering the ordinary work and by a variety of prizes encouraging numbers to compete.

5. Under the present system there is a first and second Intermediate examination during each of the four terms.

Those who obtain at least three-fourths of the marks on the papers are passed without an oral examination.

6. The Committee recommend as follows :

(1) That after the next Michaelmas Term (November, 1880) the special scholarships be abolished.

(2) That in each term after next Michaelmas term the persons who obtain at least three-fourths of the marks obtainable on the papers at either of the Intermediate Examinations be entitled to present themselves on the following day for a further written examination for honours on the same subjects embracing the same number of questions, with the same aggregate value of marks obtainable in each subject.

(3) That the persons obtaining at least three-fourths of the aggregate marks obtainable on the papers in both the pass and the honour examinations, and at least one-half of the aggregate marks obtainable on papers in each subject in both examinations be passed with honours, and that each person so passed receive a diploma certifying to the fact.

(4) That of the persons passed with honours the first be entitled to a Scholarship of \$100 ; the second to a Scholarship of \$60 ; and the third to a Scholarship of \$40, and that each scholar receive a diploma certifying the fact.

7. The Committee would observe that the maximum expenditure involved in the proposed scheme is \$1 600, being only \$880 in excess of the present expenditure for special scholarships proposed to be abolished.

8. The Committee would further observe that the adoption of their proposals would render necessary some alteration in the periods fixed for the examinations, so as to give more time for their conduct, a change which they believe to be on other grounds

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desirable, and they recommend that this subject be referred to the Committee on Legal Education to report next Term.

9. The Committee would recommend that any rule necessary to give effect to their plan should be adopted this Term, with a view to its early publication, so that ample time may be given to the students to prepare for the first examinations to be held under the new plan.

(Signed) EDWARD BLAKE.

The Report was ordered for immediate consideration.

Mr. Read moved, seconded, by Mr. Mackelcan, that the Report be adopted. — Carried.

Mr. Mackelcan moved, in pursuance of the Report, as follows:—

That, in pursuance of the recommendation of the special Committee on Scholarships the following rule be adopted:—

1. That after next Michaelmas Term the special scholarships be abolished.

2. That in each Term, after next Michaelmas Term, the persons who obtained at least three-fourths of the marks obtainable on the papers at either of the Intermediate Examinations be entitled to present themselves on the following day for a further written examination for honours on the same subjects, embracing the same number of questions, with the same aggregate value of marks obtainable in each subject.

3. That the persons obtaining at least three-fourths of the aggregate marks obtainable in the papers, in both the Pass and the Honour Examinations, and at least one-half of the aggregate marks obtainable on the papers in each subject on both examinations, be passed with honours, and that each person so passed receive a diploma certifying to the fact.

4. That of the persons passed with honours, the first be entitled to a scholarship of \$100, the second to a scholarship of \$60, and the third to a scholarship of \$40, and that each scholar receive a diploma certifying the fact.

The said rule was read a first and second time.

Mr. Mackelcan moved that Rule No. 8, as to Draft-Rules, be dispensed with, and

that the rule be read a third time now.—Carried unanimously.

The rule was then read a third time and adopted.

The Report of the Legal Education Committee on the case of L. J. Smith in favour of his application to be admitted as a student-at-law;

On the case of C. E. Irvine against the prayer of his petition;

On the case of W. G. Eakins recommending that he receive his Certificate of Fitness.

On the case of Virgil Lee recommending that the prayer of the petition be granted and his service allowed;

On the case of F. Beverly Robertson reporting that he is within the rules, and recommending that he receive his Certificate of Fitness on compliance with the requirements of convocation;

On the case of Goodwin Gibson, recommending that he receive his Certificate of Fitness:—was received, read and adopted.

Ordered, that L. J. Smith be entered on the books as a student-at-law in the Matriculant class.

Ordered, that the prayer of C. E. Irvine's petition be refused.

Ordered, that W. G. Eakins receive his Certificate of Fitness.

Ordered, that the prayer of Virgil Lee be granted, and his service allowed.

Ordered, that F. B. Robertson receive his Certificate of Fitness on the payment of the proper fee in special cases.

Ordered, that Goodwin Gibson receive his Certificate of Fitness.

The petition of Frederick Wright, praying for call to the Bar under the rules in special cases, was received and read. Mr. Read moved that the petition be referred to a select committee, composed of Messrs. Read, Crickmore, and Bethune, to inquire into and report on the regularity of the papers, and to conduct the examination of Mr. Wright.—Carried.

The letter of Mr. J. G. Scott to the Secretary on the subject of the passage way to the Master's office was read.

The letter of Mr. W. Jones on the subject of the roof of the east wing of Osgoode Hall, was received and read.

Ordered that the letter be referred to the Finance Committee, with power to take steps for the proper roofing of the building.

The letter of Eudo Saunders as to a certificate of his having passed his examination as an articled clerk, was received and read.

Ordered that for the future all persons who have passed the examination as articled clerks, be entitled to receive a certificate to that effect, signed by the Secretary, on payment of a fee of one dollar.

Mr. Robertson moved the third reading of the proposed rules, read a first and second time last term, as follows :

1. That subsection 1 of section 4 of rule 2, under 39 Vic. cap. 31, section 1, be rescinded, from and after the last day of Michaelmas term next.

Mr. Henderson moved in amendment to strike out the words "Of Michaelmas term next," and to insert "of this Term" in lieu thereof.—Carried.

The rule as amended was read a third time, as follows :

1. That subsection 1 of section 4 of rule 2, under 39 Vic. cap. 31, section 1, be rescinded, from and after the last day of this term.

The rule as amended was adopted.

Mr. Robertson, by leave, withdrew the second rule proposed.

Mr. Storm, the architect, laid before Convocation plans to meet the objection raised by the Government Engineer.

Ordered that a representation be made to the Government, with a view to inducing them to accede to the original plan, and in case that be not agreed to, that the Committee be authorized to proceed on the modified plan.

The Select Committee appointed to consider the papers and conduct the examination of Mr. Frederick Wright, presented their report, which was received and read.

Moved by Mr. Crickmore, that the report be considered forthwith.

Mr. Robertson moved in amendment that it be considered the first day of next term.

The amendment was lost. The report was ordered for immediate consideration.

Mr. Crickmore moved that the report be adopted.—Carried.

Mr. Wright was ordered to be called to the Bar, and attended, and was called accordingly.

Convocation adjourned.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

SUPREME COURT OF CANADA.

JUNE SESSIONS, 1880.

NORTH ONTARIO CONTROVERTED ELECTION.

WHEELER, *Appellant*, and GIBBS, *Respondent*.

Promise to pay legal expenses, sub-sec 3, sec. 92, The Dominion Elections Act, 1874.

Appeal from a judgment of Mr. Justice Armour, deciding that the appellant had been personally guilty of bribery within the meaning of sub-sec. 3, sec. 92, of the Dominion Elections Act, 1874, "for having agreed and promised to pay the expenses of one Hurd, a voter and a professional speaker." It was admitted Hurd addressed meetings in the interest of appellant, and during the time of the election made no demand for expenses except on one occasion; when, being unexpectedly without money, he asked for and received the sum of \$1 50 for the purpose of paying the livery bill of his horse.

Held, that the weight of evidence showed that the appellant only promised to pay Hurd's travelling expenses, if it were *legal to do so*, and such a promise was not a breach of sub-sec 3, of sec. 92, of the Dominion Elections Act, 1874.

The question, whether or not under the law, candidates may or may not legally employ and pay for the expenses and services of canvassers and speakers, the Chief-Justice said it was unnecessary to determine as the appellant had not paid Hurd's expenses.

Hodgins, Q.C., for appellant.

Heeler Cameron, Q.C., and *McCarthy*, Q.C. for respondent.

Sup. Ct.]

NOTES OF CASES.

[Sup. Ct

SELKIRK CONTROVERTED ELECTION.

YOUNG, *Appellant*, and SMITH, *Respondent*.
Dominion Election Act, sec. 98.

Held, That the term "six next preceding sections," in the 98th sec. of The Dominion Controverted Elections Act, 1874, means the six sections preceding the 98th, and that the hiring of a team to convey voters to the polls, prohibited by the 96th section is a corrupt practice, and will void an election if an agent is proved to have intentionally hired a team for that purpose.

Hector Cameron, Q.C., for appellants.

C. Robinson, Q.C., and Bethune, Q.C. for respondent.

FARMER, *Appellant*, v. LIVINGSTONE, *Respondent*.

Letters Patent—Parliamentary title—Equitable defence.

Appeal from a judgment of the Court of Queen's Bench for the Province of Manitoba. The action was one of ejectment, to recover possession of S. W. of sec. 30, 6 Township, 4 Range Manitoba, from defendant who had applied for a homestead entry on the lot in question, and paid a fee of \$10, but who was subsequently informed by the officers of the Crown that his application could not be recognised, therefore was refunded the \$10 he had paid. The appellant, at the trial, put in, as proof of his title, Letters Patent under the great seal of Canada, granting the land in question to him in fee simple. At the trial, the defendant was allowed, against the objection of the plaintiff's counsel, to set up an equitable defence and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and by fraud; and the Court of Queen's Bench in Manitoba

Held, that the defendant had established his right to have the said patent set aside, and that the defendant had become seized and possessed of a Parliamentary title to a homestead right.

On appeal to the Supreme Court this judgment was reversed, and it was

Held, that under the practice which prevailed in England in 1870, which practice was in force in Manitoba under 38 Vict. c.

12, sec. 1 (Man.), such defence could not be set up, and that the plaintiff was not bound to offer evidence in support of said Letters Patent, if they were not assailed by "action, bill or plaint," under 35 Vic. c. 23, sec. 69.

Bethune, Q.C., for appellant.

J. A. Boyd, Q.C., for respondent.

PARSONS, *Appellant*; and THE STANDARD FIRE INSURANCE COMPANY, *Respondents*.

Insurance—Prior and subsequent Insurance.

The question upon which the appeal was determined was whether or not the appellant being insured in the Western Insurance Company, to the extent of \$2,000, which formed a portion of a sum of \$8,000, further insurances mentioned in the Policy sued upon, having allowed the Western's Assurance Policy to expire, could insure for the same amount in the Queen's Insurance, without the consent of the respondent's company.

The policy had endorsed upon it the following conditions: "The company is not liable for loss, if there is any prior insurance in any other company, unless the company's assent appears herein, or is endorsed thereon, nor if any subsequent insurance is effected in any other company, unless, and until, the company assent thereto in writing signed by a duly authorized agent."

Held, on appeal, that as the policy on its face allowed additional insurance to the amount of \$8,000 over and above the amount covered by the policy sued on, the condition as to subsequent insurance must be construed to point to further insurance beyond the amount so allowed, and not to a policy substituted for one of like amount allowed to lapse.

D'Alton McCarthy, Q.C., for appellants.

Bethune, Q.C., for respondents.

PETERKIN, *Appellant*, and MCFARLANE ET AL., *Respondents*.

Discretionary power of Court of Appeal to allow amendments—Supreme Court will not interfere.

The Court of Appeal for Ontario, on an appeal from a decree of SPRAGGE, C., who

had refused a defendant who admitted the plaintiff's right to redeem certain property, but alleged that he was a purchaser for value without notice, leave to amend in order that he might plead the Registry Act, *held*, that the amendment should have been allowed, and that the Court would allow the amendment under the Administration of Justice Act, s. 50.¹

On appeal, the Supreme Court

Held, that the Legislature of Ontario having thought fit to invest all the Courts in the Province with a discretionary power in matters of amendment, this Court will not fetter that power by entertaining an appeal from an order of the Court of Appeal for Ontario, made in the exercise of such discretionary power.

J. A. Boyd, Q. C., and Atkinson, for the appellants.

Bethune, Q. C., and Skead, for respondent.

McQUEEN, Appellant; and THE PHOENIX MUTUAL INS. COMPANY, Respondents.

Insurance—Notice—Assent—Part of loss payable to creditors—Right of action.

Appeal from a judgment of the Court of Appeal for Ontario.

On the 19th Nov., 1877, the defendant's agent issued to the plaintiff a thirty days' interim receipt, subjecting the insurance to the conditions of the defendants' printed form of policy then in use, the fourth condition being as follows: "If the property insured is assigned without a written permission endorsed thereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void."

Before the expiration of the thirty days, and before the issue of a policy, plaintiff assigned to one McKenzie and others in trust for his creditors the insured property and notified the company's agent of the assignment, who assented thereto, and stated that no notice to the company was necessary as the policy would be made payable to the assignees. The policy was issued on the 12th Dec., 1877, and the loss, if any, was made payable to George Mc-

Kenzie and others, as creditors of the plaintiff, as their interests might appear.

Held—On appeal, that the notice of the assignment to the defendants' agent, while the application was still under consideration and before the policy was issued was sufficient.

2. That the words "loss payable, if any, to George McKenzie," &c., operate to enable the defendant company in fulfilment of that covenant to pay the parties named; but as they had not paid them and the policy expressly stated the appellant to be the person with whom the contract was made, he alone could sue for a breach of that covenant.

Attorney-General Mowat, for appellant.

Bethune, Q. C., & Foster, for respondents.

LANGLOIS V. VALIN.

Costs—Counsel arguing his own case—No counsel fee.

Appeal from a ruling of the Registrar of the Supreme Court refusing counsel, who had argued his own case, the fee allowed to counsel by the tariff.

Held, that the Registrar's ruling was correct.

COURT OF APPEAL.

C. P.]

[Sept. 7.]

MAY V. STANDARD INSURANCE COMPANY.

Fire insurance—Condition forfeiting policy for seizure of goods—Just and reasonable conditions.

It was provided, by a special condition of a policy of insurance on certain goods, that if the insured property should be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding in law or equity, the policy should cease to be binding on the company.

After the insurance was effected an execution issued against the goods of the insured, under which the bailiff made a formal seizure of the goods covered by the policy. He did not place any one in possession or deprive the insured of their possession or

C. of A.]

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[C. of A.]

custody, and a day or two afterwards, upon a bond being given, the seizure was withdrawn.

Held, reversing the judgment of the Common Pleas, that this was not a seizure or taking into possession within the meaning of the condition; an actual and not merely a technical custody and possession being required to establish a breach thereof.

Appeal allowed.

Q. B.]

[Sept. 7.]

MADDEN V. COX ET AL.

Bill of exchange—Drawn on President—Personal liability.

By section 5 of 16 Vic. c. 241, power was given the Midland Railway Company to become parties to bills and notes, and it provided that any bill accepted by the president with the countersignature of the secretary, or any two of the directors, and under the authority of a majority of a quorum of the directors, should be binding on the company, and every bill accepted by the president as such, with such countersignature, shall be presumed to have been properly accepted for the company until the contrary be shown: that the seal shall be unnecessary, nor shall the president, &c., so accepting any bill, be individually liable.

A bill of exchange addressed "To the President, Midland Railway," was accepted in these words: "For the Midland Railway of Canada; accepted, H. Read, Secretary; Geo. A. Cox, President."

Held, per BURTON, J. A. and OSLER, J., affirming the judgment of the Court below, that the defendant Cox (who was admitted to be the president) was personally liable.

Per PATTERSON and MORRISON, J.J. A., that the defendant Cox was not so liable.

J. K. Kerr, Q.C., for the appellant.

C. Robinson, Q.C., for the respondent.

Q. B.]

[Sept. 7.]

McINTYRE V. NATIONAL INSURANCE COMPANY.

Insurance—Statutory conditions—Pleading.

Held, affirming the judgment of the Queen's Bench, and following *Parsons v.*

The Citizens' Insurance Company, that the policy must be read as containing no conditions binding on the assured.

Held, also, that there had been no breach of the condition.

J. K. Kerr, Q.C., for the appellant.

McMahon, Q.C., for the respondents.

Appeal dismissed.

Q. B.]

[Sept. 7.]

COSGRAVE V. BOYLE.

Promissory note—Death of indorser—Notice of dishonour.

The plaintiffs discounted a note endorsed to them by S. at a bank. S. subsequently died, leaving the defendant his executor, who proved the will before the note matured. The bank, who were not aware of the death of S., protested note for non-payment, and addressed notice of dishonour to S. at the place where the note was dated, as no other address had been given by S. The plaintiffs knew of the death of S. and three days before the maturity of the note, wrote to S's son, calling his attention to it.

Held, per BURTON and PATTERSON, J.J. A., that even if the notice was sufficient so far as the bank was concerned it did not enure to the plaintiffs' benefit.

Per MORRISON, J. A., and GALT, J., that the notice given by the bank was sufficient, and the plaintiffs were entitled to rely on it.

Robinson, Q.C., and O'Sullivan, for appellant.

McMichael, Q.C., for respondent.

C. C. Middlesex.]

[Sept. 7.]

HODGINS V. JOHNSTON.

Chattel mortgage—Subsequent purchasers—R.S.O. c. 119, sec. 10.

Held, affirming the judgment of the County Court, that the subsequent purchasers or mortgages mentioned in the 10th section of the R.S.O. c. 119, are those who acquire rights after the expiration of a year from the time of filing.

Meredith, Q.C., for the appellant.

Kerr, Q.C., for the respondent.

Appeal dismissed.

C. of A.]

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[C. of A.]

Spragge, C.] [Sept. 7.]

GEORGEAN BAY V. FISHER.

Action against owner of lost vessel—Limitation of liability—Right to restrain proceedings at law—17 & 18 Vict. chap. 104 (Imp.).

The defendant, as administratrix of her husband, who lost his life by the foundering of a steamer belonging to the plaintiffs, called the *Waubuna*, on which he was a passenger, sued the plaintiffs to recover damages under R. S. O. c. 128.

The plaintiffs filed a bill under 17 & 18 Vict. chap. 104 (Imp.), to restrain the action. They also prayed that it might be determined by the Court whether they were liable for loss of life or merchandise, and if so for what amount, and who were entitled thereto.

Held, reversing the decrees of SPRAGGE, C., that the *Waubuna* was not a British ship, and therefore not within the limitation clauses of the above Act, but that, even if it were, the plaintiffs were not entitled to an injunction, as they did not admit that they were answerable in damages to the extent mentioned in the Act, and bring into Court or offer to secure the amount for which they would be liable.

Bethune, Q.C., and G. Moss for appellant.

McCarthy, Q.C., and Craigman for respondents.

Appeal allowed.

Spragge, C.]

[Sept. 7.]

CAMPBELL V. McDUGALL.

Mortgage—Non-disclosure of unregistered agreement to postpone mortgage.

The plaintiff being about to advance money to W. M. on property on which the defendant, J. M., had a prior mortgage, J. M. executed an agreement that the proposed mortgage to the plaintiff should have priority over his. This agreement was not registered, and ten years afterwards J. M. assigned his mortgage to the Quebec Bank to secure acceptances on which he was liable, and the assignment being registered superseded the agreement, the existence of which J. M. had not mentioned to the bank.

The plaintiff filed a bill against the execu-

tor of W. M., the Quebec Bank and J. M. for payment of the amount due; and in default that mortgaged premises should be sold and that J. M. might be ordered to make good any losses sustained by reason of J. M. having assigned his mortgage to the bank.

The evidence showed that the present value of the land was not worth enough to cover J. M.'s indebtedness to the bank.

Held, that the Court could not, under the circumstances, order a sale of the property in opposition to the wishes of the bank, at the instance of J. M., a subsequent incumbrancer, who did not ask to redeem; but that the plaintiff was entitled to a decree against J. M. for payment of the mortgage money, leaving J. M., when he had paid off the amount, to pursue whatever remedy might be available as between him and the bank for whatever surplus, the property may yield, the plaintiff in the meantime retaining his position as a subsequent incumbrancer.

Held, also, BLAKE, V.C., dissenting, that as the litigation was occasioned more by plaintiff's neglect to register the agreement than by J. M.'s omission to mention it, neither party were entitled to costs, either in this Court or the Court below.

C. C. Wellington.]

[Sept. 10.]

MITCHELL V. COFFEE.

Execution—Seizure—Exemption from—Reaping machine.

The defendant, as landlord, levied on a reaping machine on premises leased by him to the plaintiff, who there carried on the business of an hotel-keeper. It appeared that the machine belonged to one W., and had been left some six months before at the hotel by one R., W.'s agent for the sale of reaping machines, when he was stopping at the plaintiff's hotel. It was not shown that R. had ever been at the hotel since except perhaps on one occasion. The plaintiff was paid nothing for keeping the machine, nor did he assume any responsibility for its safety. At the trial it was sought to prove that it was essential to the plaintiff's business to keep as well as receive these machines in this

C. of A.]

NOTES OF CASES.

[C. of A.]

manner brought by his customers, but the evidence merely shewed that a refusal by a landlord to take charge of such goods would render his house less popular.

Held, reversing the decision of the Judge of the County Court, that the machine was not exempted from seizure.

Ferguson, Q.C., for the appellant.

Dunbar, for the respondent.

Appeal allowed.

Osler, J.]

Sept. 7.

GRUICKSHANK V. COREY.

Arbitration—Verbal appointment of arbitrator.

The plaintiff and the defendant agreed in writing to submit certain matters in dispute to an arbitrator, to be selected by a person named, who subsequently appointed the arbitrator verbally.

Held, per PATTERSON and MORRISON, J. J. A., affirming the decision of OSLER J., that it was not necessary for the appointment to be made in writing in order to make the submission a rule of court.

Per BURTON and ARMOUR, J. J. A. that the appointment not being in writing, it was a parol submission, and could not be made a rule of court.

Robinson, Q.C., for the appellant.

E. Martin, Q.C., for the respondent.

C.C. York.]

[Sept. 10.]

DOUGLAS V. GRAND TRUNK RAILWAY CO.

Railway Co.—Obligation to fence—C. S. C., c. 66.

The plaintiff sued the defendants for the loss of certain cattle which had escaped to their road by reason of the neglect of the company to fence, and were killed by their train.

It appeared that the plaintiff owned land on either side of the defendant's railway, but on the north the T. G. & B. R. Co. ran between his land and the railway.

Held, that there was no evidence that the cattle had reached the railway from the south side, and the fact that the T. G. & B. R. W. Co. had neglected to fence did not give the plaintiff, in respect of the occupation

of their land by his cattle, the status of that company for the time as adjoining proprietors, so as to make the defendants liable—and a verdict was accordingly ordered to be entered for the plaintiff.

McMichael, Q.C., for the appellant.

Hazel for the respondent.

Appeal allowed.

Q. B.]

[Sept. 20.]

COWLEY V. DICKSON.

Landlord and tenant—Covenant to deliver up possession on notice of sale—False representation of sale—Action for.

By a covenant contained in a lease of a farm from the defendant to the plaintiff, it was provided that upon receiving six month's notice from the lessor that he had sold the demised premises, and upon necessary compensation for all labour from which he had not received any return, the lessee would deliver up possession at the end of the six months, the compensation being first paid. The defendant served the plaintiff with a notice that he had sold, and required delivery in accordance with the agreement, in consequence of which the plaintiff desisted from operations for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff sued the defendant for false representation.

Held, reversing the judgment of the Queen's Bench, that the plaintiff was enabled to recover the damage sustained by him in consequence of the notice.

Dunbar for the appellant.

Drew, Q.C., for respondent.

Appeal dismissed.

C. C. York.]

[Sept. 20.]

MCMULLIN V. WILLIAMS.

Sale of piano—Receipt note—Parol evidence of warranty.

The plaintiff sued the defendant for breach of warranty, upon the sale of a piano given by a salesman in the defendant's shop, that the instrument was sound and in good order.

The defendant signed the ordinary receipt note providing for payment of the

C. of A.]

NOTES OF CASES.

[C. of A.]

price, in which there was no mention of the warranty.

Held, that parol evidence of the warranty was admissible, as it appeared that the receipt note was not intended to be the evidence of the whole contract.

Held, also, that it was not necessary to prove that the salesman had authority to give the warranty.

Rose for the appellant.

Delamere for the respondent.

Armour, J.] [Sept. 20.
CORPORATION OF COUNTY OF HASTINGS v.
PONTON.

Registrar's fees—R. S. O. c. 111.

This action was brought by the plaintiffs to recover from the defendant the registrar of the County of Hastings, the excess of fees mentioned in sections 99, 100, 102, 103 of the R. S. O. ch. 111.

The defendant demurred to the declaration on the ground that the sections above mentioned were *ultra vires* of the Local Legislature, as it imposed an indirect tax, and not a tax for raising a revenue for provincial purposes.

Held, affirming the judgment of ARMOUR, J., that, if a tax at all, it was clearly a direct tax, and within the legislative jurisdiction of the Province.

Held, also, that having received the money in question under the above Act, the defendant could not deny that he received it for the purposes therein indicated.

Bethune, Q. C., for the appellant.

McMichael, Q. C., for the respondent.

Appeal dismissed.

Proudfoot, V. C.] [Sept. 25.
WILLIAMS v. CORLEY.
Commission agent.

Held, reversing the decree of PROUDFOOT, V. C., that the evidence clearly established that plaintiff was acting as a commission agent, in the purchase of the corn in question, and that the defendant was not therefore justified in refusing to accept it, because it was not in prime order on its arrival, as it

appeared that it was purchased and shipped in good order.

C. Moss, for the appellant.

Cassels, for the respondent.

Appeal allowed.

C. C. Wellington.] Sept. 25.

JENES v. DORAN.

Promissory note—Indorsement by payee of an insolvency—Right of innocent indorsee to recover.

Held, reversing the decision of the County Court, that the plaintiff was not enabled to recover on a promissory note which had been indorsed to him by the payee for consideration, and *bona fide*, after the payee had been in insolvency, and the title to the note had passed to his assignee.

Ferguson, Q. C., for the appellant.

Dunbar for the respondent.

Appeal allowed.

Spragge, C.] [Sept. 25.
GREET v. ROYAL INSURANCE CO.—GREET
v. CITIZENS' INSURANCE CO.

Fire insurance—Omission to disclose threats—Prior insurance.

In answer to the question put by one company in an application for insurance on a mill, "Have you any reason to believe that your property is in danger from incendiaries?" and by another company, "Have you any reason to suppose, &c.?" the owner, B., answered each in the negative.

The mill had been burnt some months previously and the origin of the fire was unknown. Threats had been made to B. by one R., an intemperate man, who was accustomed to indulge in threats to which no one paid much or any attention. An anonymous letter had also been received, threatening incendiarism. Persons supposed to be tramps had been seen about the mill, and B. had warned the watchman to be careful, and told him that he had received an anonymous letter.

Held, reversing the decree of SPRAGGE, C., that the answers were such a misrepresentation as avoided the policy.

C. of A.]

NOTES OF CASES.

[C. of A.]

Sprague, C.] [Sept. 25]

DOMINION LOAN SOCIETY V. DARLING.

Mortgage—Rectification of—Weight of Evidence.

The plaintiffs sought a ratification of the description of the premises, covered by a mortgage executed to them, by including therein the water lots and dock property in front of the lots described in the mortgage. The plaintiffs relied wholly on parol evidence, while the documentary evidence was entirely in favour of the defendants.

Held, affirming the decree of SPRAGUE, C., that no case was made for a reformation of the mortgage.

Meredith, Q.C. for the appellant.

Ferguson, Q.C., and *Bain*, for the respondents.

Appeal dismissed.

C. C. Huron.]

[Sept. 25.]

COLBERT V. HICKS.

Malicious arrest—Reasonable and probable cause—Variance.

The declaration alleged that the deposition was that the harness in question was stolen by the plaintiff, whereas it was proved that the statement in the information was qualified by the addition of the words "as he supposed."

Held, affirming the judgment of the County Court, no variance.

The defendant swore that the information was laid by him on the advice of the magistrate, and that he did not interfere in the issue of the warrant for the plaintiff's arrest; but the magistrate proved that the information contained the substance of the statements which the defendant made.

Held, that under these circumstances, as there was an absence of reasonable and probable cause, the defendant was liable.

Ferguson, Q.C., for appellant.

H. Becher, for the respondent.

Appeal dismissed.

C. C. York.]

[Sept. 25.]

COOPER V. BLACKLOCK.

Promissory note—Authority of agent to sign.

Upon the insolvency of J. B., who car-

ried on business under the name of Blacklock & Co., his wife purchased his estate from the assignee. The business was continued under the same name, and was entirely managed and controlled by J. B. for his wife, who empowered him by power of attorney to manage the business, and inter alia to make promissory notes on and about her said business.

Being pressed by a creditor for payment of a note, which he had given before his insolvency, and which was still undischarged, he gave him a note signed B. & Co., per pro. J. B.

Subsequently he was sued for the amount of this note, when he swore that it was his wife's note, and made with her authority, whereupon the holder sued the wife.

At the trial she swore that she had separate estate, and that she had purchased the estate with it, but on the advice of her counsel, she declined to give any information concerning it. She said that J. B. had no authority to give the note in question; but it appeared, that he frequently discussed his own affairs with her, and he would not swear that he did not tell her that he had given the note in question.

Held, affirming the judgment of the County Court, that notwithstanding the power of attorney, the real scope of J. B.'s agency could be ascertained from any admissible evidence, and that there was sufficient evidence to justify the finding of the judge that J. B. had authority to sign the note sued on.

Ferguson, Q.C., for appellant.

McMichael, Q.C., for respondent.

Appeal dismissed.

GREY V. MERCANTILE INS. CO.

The question put by the company in this case was, "Is there any incendiary danger threatened or apprehended?" which was answered in the negative.

Held, affirming the decree of SPRAGUE, C., that this was also a misrepresentation which avoided the policy.

Held, also, that the insurances were avoided by the non-disclosure of the insurance in the Phoenix Insurance Co., which, under the

Q. B.]

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circumstances set out in the judgment, was held to be a valid insurance.

Bethune, Q. C., and C. Mass, for the appellants, The Royal Insurance Co., and the respondents, Mercantile Insurance Co.

Rae, for the appellants, The Citizens' Insurance Co.

Ferguson, Q. C., and Cassels, for the respondents.

QUEEN'S BENCH.

IN BANCO.

Aug. 30.

FORAN V. MCINTYRE.

Timber licenses—Rights acquired by Railway Company before Confederation over Crown lands—Assignees of Railway Company not liable for trespass thereon.

Held (ARMOUR, J., dissenting), that the timber licenses, claimed by the plaintiff, as licensee of the Ontario Government, were subject to the right of the Canada Central Railway Company, acquired before Confederation, to construct their road across the Crown lands, over which the licenses in question extended, and that the defendants, assignees of the railway company, were, therefore, not liable in trespass for entering upon and cutting timber on the said limits in prosecution of the work of building the road of the said railway company.

Bethune, Q. C., for plaintiff.

J. K. Kerr, Q. C., contra.

QUEEN V. LUCIEN BARNES.

Profanation of Lord's Day—Illegality of Sunday Concerts—Imp. Act 21 Geo. III., chap. 49.

The Imp. Act 21 Geo. III., chap. 49, prohibiting amusements and entertainments on the Lord's Day, to which persons are admitted by the payment of money, or by tickets sold for money, is in force in Ontario, and an application to quash a conviction thereunder for keeping a disorderly house, known as the "Royal Opera House," opened and used for public entertainment

on the Lord's Day, &c., was therefore refused.

Held, also, that the preamble of the Act reciting that it was intended to remedy mischiefs "in the Cities of London and Westminster" did not limit the enacting words, which were unrestricted and of general application to the whole kingdom.

Held, also, that the Act, as to its subject matter, being designed to promote Sabbath observance, is of general utility and application.

Held, also, that Imp. Statutes passed previously to the introduction of the Criminal Law of England into this country continue in force here, unless expressly repealed by Canadian Statutes, and the decision of this Court on the Mortmain Acts, in Doe d. Anderson v. Todd, 2 U. C. R. 82, disapproved.

Fenton, for Crown.

McCarthy, Q. C., and Murphy, contra.

IN THE MATTER OF THE GRAND JUNCTION RAILWAY COMPANY AND THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

Railway Company—By-law in aid of—Refusal to issue debentures—Mandamus.

In December, 1870, defendants' council read twice a by-law, granting \$75,000 in aid of plaintiffs' railway, on certain conditions, secured by 20-year debentures, with interest and sinking fund. The by-law was approved by the ratepayers, but the council refused to read it a third time or act upon it. By 34 Vict. c. 48, O., the Legislature made valid the by-law, as if it had been read a third time, and directed the issue of the debentures; and other Acts were passed by the Ontario Legislature bearing on the question. No debentures were ever issued or provision made for interest or sinking fund.

Held, on application for mandamus to compel defendants to issue the debentures, that, in the construction of all the statutes, the council were bound to issue the debentures to the trustees appointed by the Legislature; CAMERON, J., dissenting as to the sufficiency of the appointment of trustees.

Chan.]

NOTES OF CASES.

[Chan.]

Held, also, that the company had been duly kept alive by the operation of all the different statutes relating thereto.

Blake, Q.C., and H. Cameron, Q.C., for plaintiffs.

Bethune, Q.C., and Edwards, contra.

VACATION COURT,

Oaler, J.]

[Aug. 28.]

IN RE CORPORATION OF TOWNSHIP OF YORK AND WILSON.

Arbitration and award—Submission—Appeal—R. S. O. ch. 50, s. 191.

Where a submission to arbitration contained only the usual provision that the agreement might be made a rule of Court, and that the Court might be moved to set aside or refer back the award: *Held*, that this conferred no right of appeal under R. S. O. ch. 50, s. 191.

J. K. Kerr, Q.C., for plaintiffs.

Bull, contra.

CHANCERY.

The Chancellor.]

[Sept. 1.]

LOWSON V. CANADA FARMERS' INSURANCE Co.

Fire Insurance—Mutual Insurance—Ultra Vires.

By the statute incorporating an Insurance Company, which was authorized to carry on business on the mutual as well as the proprietary principle, it was enacted that "no mutual insurance shall be effected on . . . nor on any kinds of mills, carpenters' or other shops, which, by reason of the trade or business followed, are rendered extra hazardous; machinery, breweries, distilleries, tanneries, or other property involved in similar or equal hazard." The Company, professing to act under their charter, granted a policy of insurance on a grist, carding and fulling mill, which were all in one building, and the position therein of the picker, it was alleged, rendered the risk extra hazardous. The structure was destroyed by fire. In a suit instituted to compel payment of the insurance, the Company raised the defence of *ultra vires*, which the Court sustained, and dismissed the bill,

but, under the circumstances, without costs, the Chancellor observing, "The point . . . goes to the very root of the plaintiff's case, and makes it unnecessary for me to make any disposition of the points in the case. I should have been well pleased to have come to a different conclusion upon the question upon which I decide the case, for the defendants, the Insurance Co., in opposing the plaintiff's claim, are resisting upon inequitable grounds the payment of a just debt. I should not say this, if the evidence which was taken before myself did not lead me to that conclusion."

The Chancellor.]

[Sept. 1.]

NEILL ET AL. V. CARROLL.

Mechanics' Lien Act—Lapse of time—Repairing property.

The plaintiffs delivered and set up for the defendant a boiler and engine, supplied by themselves, in Sept., 1878, upon certain terms of credit, which expired on the 25th April, 1879, and registration of the lien was effected on the 23rd December, 1878, and a bill to enforce the lien was filed on the 31st May, 1879.

Held, that the effect of the delay in the institution of the suit was that the lien under the Act had ceased to exist, notwithstanding the plaintiffs had done some work upon the machinery late in December, 1878; the time within which the registration was to be effected was not to be computed from the time such alterations were made, or the defects in the machinery remedied.

The Chancellor.]

[Sept. 1.]

BELL V. LEE.

Will—Insane delusion—Will wholly inoperative.

A testator, owing to his labouring under an insane delusion as to the legitimacy of one of his daughters, made no provision whatever for her, whilst he made some provision for his other daughters.

Held, that this rendered the will wholly inoperative, not inoperative in part only—that is, as regards the daughter for whom no provision had been made.

Chan.]

NOTES OF CASES.

[Com. Law Cham.

The Chancellor.] [September 15.]

GRIFFIN v. PATTERSON.

Married woman—Separate estate—Liability for goods furnished.

A married woman, married before 1859, possessed of property in her own right, conveyed to her in 1874, who was residing with her husband and children, was in the habit of obtaining on credit goods for the use of the family—some by herself, some by her children, none by the husband—and which it was shown were charged in an account headed in her name.

Held, not sufficient to raise an implied *assumpsit* by her to pay for the same; and in the absence of any express promise by her to pay for such goods, the seller was not entitled to recover their value against her.

THE ATLANTIC AND PACIFIC TELEGRAPH CO.
v. THE DOMINION TELEGRAPH CO.

Pleading—Demurrer—Parties.

The rule of equity is, that if any person not made a party to the suit, be a necessary party in respect of any part of the relief prayed by the bill, it is ground of demurrer; where, therefore, a bill was filed against the Dominion Telegraph Company seeking to restrain that company from carrying out an agreement for the transfer of telegraphic messages to the American Union Telegraph Company, on the ground that such agreement was in contravention of an agreement previously entered into between plaintiffs' and defendants' companies for mutual exclusive connections and exchange of telegraphic business, without making the American Union Company a party: a demurrer for want of parties on that account was allowed with costs.

CAMPELL v. ROBINSON.

Mortgagor and mortgagee—Assignee of equity of redemption—Principal and surety—Covenant in mortgage.

When a mortgagor, who has covenanted for payment of the mortgage debt, sells his equity of redemption subject to such mortgage, he becomes surety of the purchaser

for the [payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt.

G., the owner of real estate executed a mortgage to the plaintiff, and subsequently created a second mortgage in favour of one H., which he transferred to the plaintiff. Afterwards G. mortgaged the same lands to R. and D., and subsequently assigned the equity of redemption to them, in which assignment the mortgage to the plaintiff and that to R. and D. were recited, but the intermediate one to H. was not, though the amount stated as due to the plaintiff was about the sum secured by both mortgages held by him. Default having been made, a bill was filed against G. upon his covenants and against his assignees R. and D., as the owners of the equity of redemption and entitled to redeem.

Held, that under these circumstances G. having claimed such relief by his answer, was entitled as against his co-defendants to an order for them to pay such sum as might be found due the plaintiff under his securities, and the suit having been rendered necessary by reason of the default of R. and D. in not paying the plaintiff, they were also bound to pay G. his costs of the suit.

COMMON LAW CHAMBERS.

Osler, J.]

[June.

IN RE DEAN v. CHAMBERLIN.

Rule nisi—Enlargement—Lapse—Mandamus.

Where a rule nisi in a County Court was ordered by the Judge to stand over until the next term:

Held, that it was not necessary to take out a rule to enlarge the rule nisi to prevent it from lapsing.

Held, that where a County Court Judge improperly refuses to hear the argument of a rule nisi, *mandamus* is the proper remedy.

Watson, for plaintiff.*J. K. Kerr*, Q. C., for defendant.

Osler, J.]

REGINA V. STEWART.

Absconding debtor—Appearance—Debt, sufficient to support application for attachment—Crown suit.

In an action at the suit of the Crown, an order was made for defendant's arrest as an absconding debtor. Service of the writ of attachment was accepted by his attorney, who entered an appearance to the writ.

Held, that this was a useless proceeding, and that the defendant should have put in special bail.

Held, on an application to set aside the writ, that any defect in the materials on which it was granted might be supplied by the affidavits used by the defendant in such application.

Held also, that the forfeiture of a recognizance to appear was a debt sufficient to support an application for an attachment under the Absconding Debtors' Act, R. S. O. ch. 66, and that such relief may be granted at the suit of the Crown; and this, when the defendant absconds to avoid being arrested for a felony.

Aylesworth for the Crown.

Esart for defendant.

Armour, J.]

BRYAN V. MITCHELL.

Ejectment—Equitable issues—Jury notice—R. S. O. ch. 50, sec. 257.

In an action of ejectment where equitable issues are raised, issues must be tried without a jury under R. S. O. ch. 50, sec. 257.

Holman for plaintiff.

J. Roaf for defendant.

IN RE CITY OF TORONTO V. SCOTT.

Wilson, C. J.]

[Sept. 10.]

Reference under Municipal Act, R. S. O., ch. 174, sec. 377—Award not made within a month—Enlarging time.

The Court has power to enlarge the time for making an award, although the same has not been made "within one month after

the appointment of the third arbitrator," as required by sec. 377, R. S. O., ch. 174.

Ferguson, Q. C., for applicant.

J. K. Kerr, Q. C., contra.

Wilson, C. J.] [Sept. 1.]

IN RE LARKIN V. ADAMS; WANTY V. ADAMS;
MARNEY V. ADAMS.

Mechanics' Lien Act—Costs—Prohibition.

The defendants, owners of certain lands, applied for a writ of prohibition to the Judge of the First Division Court of the County of York to restrain further proceedings on an order made under the Mechanics' Lien Act by the said Judge, ordering the defendants to pay \$5 in each suit, being the plaintiffs' costs of preparing and registering their respective liens against defendants' property.

Held, that such costs, being those of a proceeding taken for the security and advantage of the creditors, can only be recovered as against the owners of the property if given by special statutory enactment, and cannot be claimed under the provisions of the Mechanics' Lien Act.

Morphy, Winchester & Morphy, for plaintiffs.

F. E. Hodgins, for defendants.

CORRESPONDENCE.

Trial by Judge, without a Jury.

To the Editor of the LAW JOURNAL.

SIR,—The profession has a grievance which I think it will do no harm to ventilate through your journal. It has grown out of the practice which dispenses with the trial of civil cases by jury, except when either of the parties gives notice of a desire to have a jury.

We know that when a case is tried before a jury at the Assizes—and they retire for the purpose of deliberating upon their verdict—if they cannot agree after a reasonable time has elapsed, the Court discharges them, and the plaintiff is at liberty to bring the case on for trial again at the next

CORRESPONDENCE—REVIEWS.

Assizes; but when a trial takes place before a Judge, without a jury, and he takes the case *en délibéré*—there appears to be nothing in the statute which requires the Judge to find a verdict within any stated time—he may do so the same day or on any future day—he should do so within a reasonable time after the trial, and within time for either party to move during the next ensuing term. I regret to say that this is not always done. My clients have suffered on two occasions under such circumstances, on both of which the Judge who tried the case allowed the matter to stand over until he apparently forgot the evidence, and at last, after being applied to again and again, endorsed a “*pro forma*” verdict—leaving the unfortunate to his choice either to submit, or to go to the expense of moving against that verdict, and that after another Court had passed and gone. Fortunately for litigants, as a general rule, our Judges dispose of the cases as they come before them with reasonable dispatch; but it is to be regretted that there is at least one exception to this rule. Now what is the difficulty? Is the Judge unable to agree with himself? If this is the trouble, he had better be “discharged,” and allow plaintiff to bring the case on again for trial before another Judge, who, perhaps, will not see any reason for “halting on the way.” In this respect I submit that the statute should be amended so as to limit the time within which a Judge should find a verdict. It is a monstrous absurdity to allow a case to be looked up in the way in which it may now be.

Yours truly,

A BARRISTER.

September 2nd, 1880.

To the Editor of the LAW JOURNAL.

SIR,—A. and B. reside in Manitoba. A there becomes indebted to B. on contract. A's only estate lies in Ontario. By what, if any, proceeding, can B. reach this property to satisfy his debt.

Yours, &c.,

A SUBSCRIBER.

Invermay, Sept. 22, 1880.

REVIEWS.

THE RULES OF SALE AND CHATTEL MORTGAGE ACTS OF ONTARIO, by John A. Barron, Barrister-at-Law. Carlaw & Co., Toronto, Ont., 1880.

The title page summarizes the contents of the volume as being a complete and exhaustive annotation of the Rev. Stat. Ont. cap. 119, and of the Mortgage and Sales of Personal Property Amendment Act, 1880, preceded by an introductory treatise on the law of bills of sale and chattel mortgages, and having appended chapters 66, 95, 98 and 118 of the Rev. Stat. Ont., and the Act 29 Vict. chap. 28 (Dom.), in so far as the same affect the law of bills of sale and chattel mortgages, with an appendix of forms.

The book is dedicated to the Hon. Vice-Chancellor Blake; whom the author thanks for glancing through the proof, and for his kind advice and friendly counsel. The preface and introduction are both peculiar in their length and fulness; and, as a matter of convenience and book-making, we should have thought it would have been better to have given the same matter more in the shape of a treatise in connected chapters. The matter, however, is there, and well put together.

In the preface the earlier Acts are given in full. The reason for this is said to be, that by a comparison of the statutes “the enquirer can conveniently satisfy himself of the adaptability of his references,” and we agree with the author as to the usefulness of this, especially as he gives running reasons, supported by authorities, for the changes from time to time made in the law.

The introduction treats of matter constantly occurring in the course of practice, and prepares the reader for the annotation on the statutes relating to chattel mortgages, which forms the principal and most useful part of the work.

The notes on the first section of the Act alone occupy 37 pages, which gives some idea of the full treatment of the subject by the author.

We particularly notice under “goods and

REVIEWS.

chattels" the question as to goods "in esse" and "in posse," the distinctions in law given as to after-acquired goods, with and without a *novus actus*, and between the rules at law and in equity in regard to the subject-matter of mortgages and bills of sale. On this point we notice the opinion upheld that a mortgage of specific crops off specific land is good, although the crops be not in existence when the mortgage is executed (see *Howell v. Coupland*, L. R. 1 Q. B. D., 258; *McIlhargy v. Martin*, C. C. Dean, J.). Mr. Barron points out several inconsistencies in the Act, e. g.: To some instruments a witness is required to be a subscribing witness, to others he need not be. The omission in section 2 of the words "or of one of several of the mortgagees or of the agent of the mortgagee or mortgagees," and the inconsistency of the enactments in regard to the place of registry, particularly when renewing mortgages, which now, however, since Mr. Meredith's Act has become law, are chiefly overcome. To give a specimen of the work, we extract the author's remarks in reference to section 6, wherein the Statute provides for such instruments as the section covers being registered "as hereinafter provided:"

"It is worth while observing these words carefully. Mortgages within this section shall be valid and binding when registered as hereinafter provided. And there is nothing in the Act subsequent to this section in any way limiting the period within which mortgages under this section are to be filed. Section 1 limits a period within which mortgages under that section are to be filed, and section 5 limits a period within which bills of sale are to be filed. Unless mortgages under this section can be said to come within and to be included in the words 'every mortgage or conveyance intended to operate as a mortgage made in Ontario' found in section 1, it is quite clear that the Statute has fixed no period of time within which mortgages under this section are to be filed. There is no doubt that the entire statute must be resorted to in order to arrive at a conclusion as to what is required, but it seems to the author that the mortgages referred to in section 1 are so identified by the words contained therein and in section 2 relating to the affidavit of *bona fides*, that the legislature, whatever they may have meant, certainly did not contemplate a reference to mortgages under section 6 by the use of the words 'every mortgage or conveyance intended

to operate as a mortgage,' &c. Indeed there can be little doubt of this, because sections 1 & 2 of the Act have their origin in 12 Vict. cap. 74, and 13 & 14 Vict. cap. 62, whereas section 6 of this Act was first enacted by the late Statute, 20 Vict. cap. 3."

Several Acts or parts of Acts akin to the subjects treated are appended, together with a collection of forms.

Mr. Barron has done his work well, and although we think that, in a second edition, he will find it desirable to make some slight changes in form and arrangement, we can congratulate him upon having given us a very useful and timely book on a subject of much importance to the practitioner.

REPORTS OF THE SUPREME COURT OF BRITISH COLUMBIA.

We are indebted to the courtesy of Mr. Justice Crease, who edits these Reports, for a copy of the first number, containing the judgment of the case of *The Queen v. McLean and others*, on an indictment for murder. Criticism is disarmed so far as the typographical appearance of the number is concerned by the plaintive statement that only one "galley" full of type was available, which had to be charged and discharged until the 125 pages were completed. No apology, however, is necessary so far as the work of the learned reporter is concerned, for he seems to have taken the greatest pains to give a full and, we doubt not, accurate report of this important case.

An Appendix gives a mass of correspondence in connection with the trial of this case. This reveals some singular legislation in the Province of British Columbia in relation to the Judicature Act. Not the least is this, that a bill was passed taking the whole regulation of the Courts, Chambers, Rules and Orders, forms and business generally out of the hands of the Judges and giving it to the Lieut.-Governor-in-Council—a most unheard of proceeding, which can only be characterized as silly. This absurdity was equalled by the Government bringing their Judicature Act into force after only two days' notice, and then making an Order in Council to the effect that the Rules in force in England under the

FLOTSAM AND JETSAM.

English Judicature Act should be the Rules and Orders under the British Columbia Judicature Act! The powers that be seem to have got their legal matters into a most lovely tangle, and Justice has not only her eyes bandaged, but her arms (and legs too, for that matter) tied up by a complication of Gordian knots.

FLOTSAM AND JETSAM.

A LAW AGAINST WHISTLING.—In the "Statutes of the Streets," printed in 1598, it is ordered that "no man . . . shall whistle after the hour of nyne of the clock in the night," or "keep any rule whereby any such suddaine outcry be made in the still of the night, as making an affray or beating his wife or servant," etc.

We have recently seen in one of our exchanges a communication advocating the fuller reporting of the arguments of counsel and the fuller statement of facts and pleadings. This would indeed be a step backward. That which renders some of our law reports abominable and costs lawyers a great deal of unnecessary outlay is this very padding. Law reports are designed to tell the profession what the courts have decided and their reasons for their decisions. They are not designed to instruct lawyers how to plead or argue. Anything more than a synopsis of the arguments, and a bare statement of what the pleadings were, is an imposition on the profession. Why should we be compelled to pay for page on page of tedious common-law pleadings and page on page of evidence? As to the statement of facts, if the court has made it, that is usually enough. If it is not complete, supplement it sufficiently; but do not make it all over again. To read the facts in the head note, then in the reporter's statement, and finally in the opinion of the court, is "damnable iteration," and as senseless as the reading of a hymn and then singing it, in church. By proper compression, the number of our annual reports could be reduced nearly one quarter.—*Albany Law Journal*

SERGEANT ARMSTRONG.—The late Richard Armstrong, Her Majesty's First Sergeant-at-Law, who died on the 20th August, was called to the inner Bar in January, 1854, was appointed Third Sergeant in 1861, and was also, in the latter year, elected a Benchler by the Honourable Society of the King's Inns. In 1866 he was promoted First Sergeant. A Liberal in politics, he was elected Member of Parliament for the Borough of Sligo

in 1865, which constituency he continued to represent until the general election of 1868. It is said that Mr. Armstrong's latent talents were first discovered by the following incident: It happened at the Wexford Assizes that a little boy was indicted for the murder of a playfellow, and, being in humble life, his friends were without means of employing counsel for his defence. The proof of his guilt depended on circumstantial evidence, but so clear that there was no hope for the boy. He had the brogues that belonged to the murdered boy; he had a knife that was also his, and a ball with which they played. These articles were found with him directly after the murder. Chief Baron Pennefather assigned young Armstrong as counsel to defend the lad. Having read over the information, he saw what a slender hope there was of saving the boy's life. So he applied that the trial might be postponed, and the judge assented. During the next assizes in Clonmel, he was one day caught in a shower of rain, and taking refuge in a bootmaker's shop the thought struck him to ask how one pair of boots could be distinguished from another made on the same last, and the bootmaker informed him that identification was impossible, except with regard to the boots on which he was in the habit of putting a private mark. Here was the argument against conviction. Then as to the knife, there were hundreds of the same kind sold by every pedler. When the assizes came round at Wexford he cross-examined the Crown witnesses with telling effect in reference to the identity of the brogues and the knife. But then there was the ball, and the mother of the murdered boy Moore, swore she herself made it, winding it round a piece of crumpled up brown paper. Surely this was conclusive. Young as he was, the little fellow at the bar saw the force of her evidence, and asked to see his counsel. Mr. Armstrong went to the side of the dock and the prisoner whispered in his ear—"I unwound the thread and put it on again on a cork to make the ball hop." At the close of the evidence for the Crown the case seemed proved to demonstration, inasmuch that the prosecuting counsel left it in the hands of the judge and jury. But Mr. Armstrong rose, and with great power of analysis sifted the evidence, maintaining that the only real proof was that in reference to the ball—"My client's life hangs on a thread, and if it should happen that the thread is wound on paper, as the unfortunate mother of the youth who was murdered describes, then my case is lost. Let the ball be unwound, and to you, gentlemen of the jury, I commit my client's safety." The end of the thread was handed to the foreman, and amid breathless stillness it was unwound. At last down fell the cork, and a cheer in court proclaimed the safety of the prisoner, if not his innocence.—*Irish Law Times*.

LAW SOCIETY, TRINITY TERM.



Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 44TH VICTORIAE.

During this Term, the following gentlemen were called to the Degree of Barrister-at-law.

FREDERICK WRIGHT.
EDWARD MORGAN.
WILLIAM HENRY BEATTY.
JOHN CANAVAN.
EDWARD MAHON.
ALEXANDER HENRY LEITH.
JOHN JOSEPH BLAKE.
CHARLES EDWARD HEWSON.
WILLIAM HODGINS BIGGAR.
WILLIAM HENRY POPE CLEMENT.
SKEFFINGTON CONNOR ELLIOTT.
PATRICK MCPHILLIPS.
WILLIAM BRUCE ELLISON.
JOHN STANLEY HOUGH.
MICHAEL ANDREW MCHUGH.
WILLIAM GEORGE EAKINS.
JAMES ROLAND BROWN.
RICHARD WORNALL WILSON.
JAMES EDWARD LEES.
JOSHUA ADAMS.
ROBERT SINCLAIR GURD.

(The names are placed in the order in which the Candidates entered the Society, and not in the order of merit.)

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates.

EDWARD LOCKYER CURRY.
WILLIAM ARMSTRONG STRATTON.
GEORGE SMITH.
ALEXANDER SUTHERLAND.
JOSEPH BURR TYRRELL.
WILLIAM JOYNT JAMES.
THOMAS HENRY GILMOUR.
THOMAS VINCENT BADGELEY.
HARRY LAWRENCE INGLES.
JAMES BURDETT.
GEORGE ROBSON COLDWELL.

HARBOUR JOHN BULL.
ISAAC NORTON MARSHALL.
WELLINGTON JEFFERS PECK.
ALVIN JOSHUA MOORE.
WILLIAM ARTHUR DOWLER.

Matriculants.

GEORGE HAMILTON JARVIS.
EDMUND JAMES BRISTOL.
W. K. McDougall.
ALFRED HENRY COLEMAN.
ARCHIBALD McKELLAR.
STEPHEN O'BRIEN.
HARRY EARL BURDETT.
JOHN ANDREW FORIN.

Junior Class.

HORACE FALCONER TELL.
RICHARD J. DOWDALL.
DANIEL S. KENDALL.
GEORGE FREDERICK BELL.
ANGUS CLAUDE McDONELL.
OLIPH LEIGH SPENCER.
SANDFORD DENNIS BIGGAR.
HARRY ANSON FAIRCHILD.
GEORGE CRAIG.
JAMES ARMSTRONG.
ARCHIBALD MCFADYEN.
WILLIAM ALFRED JOSEPH GORDON McDONALD.
CHARLES MAIN BYGRAVE LAWRENCE.
COOTE NESBITT SHANLEY.
A. C. STEELE.
GUERRET WALL.

And the following gentlemen passed the Preliminary Examinations for Articled Clerks:—

DAVID DUNCAN.
PETER YOUNG.
MATTHEW WILKINS.

By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks'

DIARY—CONTENTS—EDITORIAL NOTES.

DIARY FOR NOVEMBER.

1. Mon... Harrison, C. J., died, 1878.
2. Tues... Primary Examinations.
3. Wed... Draper, C. J., died, 1877.
5. Fri... Sir J. Colborne, Lieutenant-Governor Upper Canada, 1838.
7. Sun... Twenty-fourth Sunday after Trinity.
9. Tues... First Intermediate Examination. Court of Appeal sittings begin.
10. Wed... Second Intermediate Examination.
11. Thur... Examinations for Admission.
12. Fri... Examination for Call.
14. Sun... Twenty-fifth Sunday after Trinity.
15. Mon... Michaelmas Term begins.
16. Tues... Wilson, J. Q. B., sworn in, and Gwynne, J., sworn in C. P., 1868.
18. Thur... Hagarty, C. J., sworn in C. J. of Q. B. Wilson, J., sworn in C. J. of C. P., 1878.
21. Sun... Twenty-sixth Sunday after Trinity.
23. Tues... Scholarship Examinations begin.
24. Wed... Scholarship Examinations continued.
25. Thur... Scholarship Examinations conclude. Lord Lorne, Governor-General of Canada, 1878.
27. Sat... Cameron, J., sworn in Q. B., 1878.
28. Sun... Advent Sunday.
30. Tues... Moss, J., appointed C. J. of Appeal, 1877.

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Canada Law Journal.*Toronto, November, 1880.*

We understand that the Chief Justice of the Court of Appeal has been recommended to go to the South of France for the benefit of his health. That there should be a necessity for this is a source

of grief to his numerous friends. We trust that he may soon return with health restored.

We are indebted both to Mr. E. Douglas Armour and to Mr. G. S. Holmsted for excellent translations of Mr. Justice Fournier's judgment in the Great Seal case, one of which will be found in another place. The subject which had become rather "stale" from a newspaper point of view, has been revived by the recent appointment of Queen's Counsel and the discussion arising thereon.

We have before us the second edition of "Leith's Blackstone," edited by Mr. Leith, Q.C., and Mr. James F. Smith. We have not yet had an opportunity of examining it, but the reputation which the first edition so very properly obtained, has doubtless already commended it to all those amongst the profession who have any desire to be familiar with the law of real property, in Ontario.

The vacancy which has so long existed on the Bench in Manitoba, caused by the death of Judge McKeagney, has been filled by the appointment of Mr. James A. Miller, Q.C., of St. Catharines. A good lawyer, and a man of shrewd common sense—he will fill the post well. Whilst we say this, we are bound also to say that there are many older men in the profession quite as qualified, who were more entitled to the preferment. It is said that it is well to have men as generals in the army who have still a good share of youthful vigour and dash, but the same reasons do not apply to judicial appointments. Vigour of mind of course is necessary, as also a fair share of bodily strength, but the wisdom of age and experience had also been considered worthy of consideration in such matters.

EDITORIAL NOTES—QUEEN'S COUNSEL.

The epigrammatic utterances of Lord Justice Knight Bruce in *Burgess v. Burgess*, 3 De G. M. & G. 896, although still quotable as a piece of excellent humour are discredited as good law. That learned Judge said "All the Queen's subjects have the right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names and not the less so that they bear the same name as their fathers'." But the present Lord Justices lay down the law more uninterestingly in this way; 'Where a person uses his name in connection with a manufactured article, the result of which user is that his goods are represented to the public as the manufacture of another person of the same name, who has previously obtained a reputation for such goods, such person will be restrained from continuing such use, though the name may be his own.'—*Thorley v. Massen*, 28 W. R. 966.

For excellent reading and for caustic observations on many venerable legal hallucinations we commend the judgment of Sir George Jessel in *Re Hallett's Estate*, 28 W. R. 733. The following may serve as samples to whet the appetite even two months after vacation. He is reversing a judgment of Mr. Justice Fry who relies on what is said by "Mr. Justice Willes in delivering the considered judgment of the Court of Common Pleas in *Scott v. Surman*, whereupon the Master of the Rolls interjects, "I do not understand that a judgment is any better for being held over a long time, for I think judgments are perhaps best if delivered when the facts are fresh in the judge's mind: but I do not say that they are better or worse." Again he lays down a valuable canon in the use of Chancery

cases: "It must not be forgotten that the rules of the Courts of Equity are not like the rules of the common law, supposed to have been established from time immemorial. In many cases we can name the Chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence; and therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases."

QUEEN'S COUNSEL.

In April, 1876, the Ontario Government created, or assumed to create, some thirty-five Queen's Counsel. We then freely expressed strong disapproval of the list then prepared. There were on it many names not entitled to the position, and many not on it that should have been there; but surprise at the selection of certain individuals was swallowed up in amazement at the wholesale nature of the transaction. Some of the appointments just made by the Dominion Government have caused surprise in a different way.

The names that appear in the *Gazette* of the 16th ult., are as follows:—

Thomas M. Benson, Francis McKelcan, William R. Meredith, James Bethune, W. H. Scott, Martin O'Gara, Thomas Ferguson, B. B. Osler, James A. Miller, John A. Boyd, James F. Dennistoun, George A. Kirkpatrick, Alfred Hoskin, Richard T. Walkem, John O'Donohoe.

The Dominion Government was not, of course, bound to recommend for appointment all those whom the Lieut.-Governor of Ontario had assumed to create some four years ago; but it was natural that a selection should have been made from

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the very full list of the year 1876. It is, however difficult to see upon what principle some of these names have been left out and others inserted.

It is an unpleasant and an ungrateful task, but we feel we cannot be true to our mission if we refrain from expressing what we believe, from careful enquiry, to be the voice of the profession on this subject. Of those in the country there is little to be said, except, *en passant*, to express surprise at the appearance of Mr. O'Gara, and the disappearance of such men as Edward Martin and others. As to the Toronto men the name of Mr. J. A. Boyd strikes every one as being in the right place. In fact, no one on the list, except perhaps, Mr. Bethune, by reason of seniority, is more entitled to the honour. But, when we admit this it, is difficult to see why the name of his senior partner, and senior at the Bar, Mr. J. K. Kerr, is omitted. When the latter was appointed in 1876, he was thought rather young, but that is more than four years ago, and he has had and still has a very extensive counsel business. Then again, if it is desired to have some of the younger members of the Chancery Bar on the list, why insert the name of Mr. Alfred Hoskin, and leave out that of Mr. Charles Moss. The former is certainly senior, but no one would pretend to say that as a counsel he occupies the position which Mr. Moss does. We are not, however, of the number who think that the distinction should in this country be entirely reserved for those who appear much in court in the conduct of important cases as senior Counsel. And so, if an additional qualification is to be imported, why give the distinction to a comparatively young solicitor, when there are numbers of much greater length of service in quite as large practice and of equally high standing.

The last name on the list suggests reflections of another character. No one can

say that he has been very long at the Bar, or that he has an extensive counsel, or even solicitor's business, or has laid the profession under obligation in a literary way as have Mr. Leith and others, which we consider forms one claim for the honour. The appointment of those who are not entitled to the honour is a slap in the face to those who are.

We agree with a correspondent, one of the most eminent and highly respected Queen's Counsel in Ontario, who writes:—"the list is a conundrum *here*, as it was where I came from." As such, "we give it up," and conclude by quoting the further remark of our correspondent who says that, "The *Law Journal* should advocate abolishing the rank. No government can be trusted with it."

It will be seen from the following regulations as to rank and precedence in the *Gazette* in reference to the recent appointments that the Dominion Government do not assume to interfere with the right of the Provincial Government to give silk gowns should such right exist. They would, however, have rank only in the Provincial Courts. The question of precedence will have to be decided by the Courts when the question arises:

"Rank and precedence are conferred upon the above named gentlemen respectively from the date of their appointments in all Courts established or to be established under the authority of any Act of the Parliament of Canada, next after the following persons, namely:

"1. Those persons who, prior to the 1st day of July, 1867, received appointments as Her Majesty's Counsel learned in the law within any of the late Provinces of Canada, New Brunswick, Nova Scotia, Prince Edward Island or British Columbia.

"2. Those persons who, since the first day of July, 1867, were appointed Her Majesty's Counsel learned in the law under the Great Seal of the Dominion of Canada.

"Furthermore rank and precedence are conferred upon the gentlemen above named from the date of their appointments in all Courts in the Province of the Bar of which they are now re-

 CONTRACTS WITH "OFFICERS AND THEIR SUCCESSORS" OF UNINCORPORATED COMPANIES.

spectively or may hereafter respectively become members, next after the following persons, namely:

"1. Those members of such Bar who, prior to the 1st July, 1867, received appointments as Her Majesty's Counsel learned in the law.

"2. Those members of such Bar who, since the 1st July, 1867, were appointed as Her Majesty's Counsel learned in the law under the Great Seal of the Dominion of Canada.

"3. Those members of such Bar, if any, who may lawfully be entitled to rank in precedence over the respective gentlemen above appointed."

CONTRACTS WITH OFFICERS
AND THEIR SUCCESSORS OF
UNINCORPORATED COMPANIES.

Cases of difficulty on which the textbooks throw little light sometimes occur in practice, where inartificial instruments are given to an unincorporated Company whereby money is secured and made payable to some officer of the company (generally the treasurer), and his "*successors* in office." The difficulty is, who is the proper person to sue in such cases, and it cannot be said that the law is either very clear or very uniform on the point. The better view seems to be that effect cannot be given to the instrument as it stands. The draftsman has attempted to provide for payment to official successors, which is in law constituting the officer a corporation sole, and this cannot be done by compact or agreement. Such attempts are made in order to vest the right of action in *one* person, and thus to get rid of the difficulty which would arise by reason of the multiplicity of plaintiffs, if all the shareholders were to sue.

An instructive case on this head of law is *Metcalf v. Bruin*, 12 East. 400, and at *Nisi Prius*, in 2 Camp. 422, which shews the practice, when the officers are still alive. There a bond was given to a number of persons jointly and severally as

trustees of the Globe Insurance Company, to secure the faithful services of a clerk to that body, which was unincorporated. It was held that the survivors of the trustees named therein could sue for a breach committed at any time during the existence of the company, notwithstanding intermediate changes of the shareholders by death and otherwise. It was said that the instrument contemplated service to be performed to a succession of masters, who might from time to time constitute the company, and that the intervention of trustees removed the legal and technical difficulties attending such a contract made with, or a suit instituted by the company themselves as a natural body. In connection with this subject, the case of *Pigott v. Thompson*, 3 B. & P. 147, is in apparent conflict with the other authorities. There a person had agreed in writing to pay the rent of certain toll-gates to the "Treasurer of the Commissioners," who were by statute empowered to appoint a treasurer. The action was brought by the proper officer of the Commissioners, who was at the date of the contract, and of the commencement of the action, their treasurer. But all the judges agreed that the plaintiff had no cause of action. Alvanley, C. J. said, that the manifest intention of the agreement was that the defendant should pay the money to any person whom the Commissioners should choose to make their treasurer for the time being, but by law a debt is not so assignable. The promise, he said, did not amount to a promise to pay to the person who was the treasurer at that time, and if he had been removed from his office, the payment to him would not have availed the plaintiff. The case turned therefore on want of privity, as was explained by Lord Mansfield, in *Bourn v. Morris*, 2 Taunt. 381, where he said in reference to *Pigott v. Thompson*, "the promise was not made to the trea-

CONTRACTS WITH "OFFICERS AND THEIR SUCCESSORS" OF UNINCORPORATED COMPANIES.

suror, though it was a promise to pay to the treasurer." The right of action was therefore vested in the Commissioners themselves, and not in their officers. So long as the particular officer with whom the contract is made remains alive, he may have the right to sue—but upon his death, what then? To borrow the words of Willis, J., in *Hybart v. Parker*, 4 C. B. N. S., 209, if the Court was to hold that the successor of such an officer could maintain the action, it would be trenching upon the prerogative of the Crown by making a new species of corporation—a corporation sole for the purpose of bringing actions. Similar observations were made by the same judge in *Gray v. Pearson*, L. R. 5 C. P. 568, and a general rule laid down as to such cases, that the proper person to bring an action is the person whose right has been violated. See also *Evans v. Hooper*, L. R. 1 Q. B. D. 45, where the Court of Appeal approved of this law. For this reason it was said by the Chief Justice in *Strange v. Lee*, 3 East, 495, that a bond to the persons then constituting a banking-house, and their successors, cannot be admitted, but it may be drawn so as to render the obligee answerable, not only to the present, but to all future partners in the house. And the same difficulty is adverted to by Lord Denman in *Graves v. Colby*, 9 A. & E., 356.

Even if a corporation sole, in the person of the treasurer and his successors could be thus constituted, still it would not give a right to the subsequent incumbent of the office to bring an action in the case supposed; because, if the personal contract were allowed to descend to such successor, the right to recover would remain in abeyance at the corporator's (i.e., officer's) death, until his successor was appointed—and the right when once suspended would not revive. This is the principle laid down in Black-

stone, and adopted by the Court as reasonable in *Howley v. Knight*, 14 Q. B., 240. It is there said that a bond given to a corporation sole, and his successors would enure as a bond to the corporators and executors. On the other hand, property given to a corporation aggregate does not go to executors, but is taken in succession. In the case of a corporation sole, the property would be in abeyance till the successor existed: the corporation aggregate always continues to be the identical grantee or purchaser: p. 253.

The result then is that in the construction of such instruments as we are considering, the words "successors in office" are to be rejected if in law the contract is such an one as will survive and pass to the executors of the obligee. Refer to the language of Coleridge, J., in *Howley v. Knight*, at p. 257. In *Dance v. Girdler*, 1 B. & P. N. R., 40, a bond was granted to twelve persons payable to them and their successors as governors of the society of musicians, conditioned to secure faithful performance of duties by their treasurer. The society was an unincorporated one when the bond was given. Mansfield, C. J., said: The bond is inaccurately drawn, being given to certain persons as governors of the society and their successors. The intention was no doubt that the bond should be payable to those who should succeed the obligees as governors. But this the law does not allow; and the bond can only be considered as given to the twelve obligees, and would ultimately have been payable to the representative of the last surviving obligee. The result in such a case then would be that which is so tersely expressed in Dicey's Book on Parties, p. 128: The right of action on a contract made with several persons, jointly, passes on the death of each to the survivors, and on the death of the last, to his representatives.

CHIEF BARON KELLY.

It would appear that the law is different in some parts of the United States, as it is there held a right of suit exists in the subsequent incumbent of the office, at all events where the engagement is for the benefit of some public or quasi-public body. See *Fisher v. Ellis*, 3 Pick., 325; *Kean v. Fisher*, 5 Serg. & Raw, 154, and *Commonwealth v. Sherman's Executors*, 6 Harris, 347.

CHIEF BARON KELLY.

The Right Hon. Sir Fitzroy Kelly, Chief Baron of the Exchequer, died in London, as our readers are aware, on the 18th Sept. He was born in 1796; was called to the bar in 1824 and made King's Counsel in 1835, and Chief Baron on the retirement of Sir Frederick Pollock in 1866. He was Solicitor-General under Sir Robert Peel, and Attorney-General in Lord Derby's Cabinet. An exchange thus relates the beginning of his circuit business in 1858.

"Mr. Kelly, on becoming a barrister, joined the old Home Circuit, now fused with the Norfolk into the South-Eastern, but left it because he found the work on this busy circuit was prolonged into the Vacation. As has been just said, he had an old-fashioned reverence for the long interlude to forensic battle which tradition has imposed upon lawyers and clients, and he changed to the Norfolk Circuit for the sake of his Vacation. The migration proved a very fortunate one. The assize was opened at Norwich. Mr. Kelly arrived at that city in the evening, and went to bed briefless. At one o'clock in the morning his clerk came to awake him with the news that an attorney wished to see him with a brief. It was for the defence of a publican and a bill-sticker, against whom a charge of libel was preferred. They had exhibited bills charging a certain clergyman with being a fit person to be made co-respondent in that Divorce Court which Sir Fitzroy Kelly was afterwards concerned

in founding. The person libelled had engaged all the leading counsel on the circuit; and the attorney, wandering in town at his wife's end, had been recommended by a friend to try the new junior. On a point of practice Mr. Kelly threw the other side over for a time, but the cause came on at Thetford. Here the leader, who had been most feared, could not attend; and Mr. Kelly got the publican off scot free, while the bill-sticker escaped with a slight loss of money. Before he left the Court the attorneys for the other side threw to him over the table two retainers, and other briefs followed him at his lodgings. From that time till he left the circuit, owing to the stress of London work, his reputation on the Norfolk Circuit was unbounded."

Chief Baron Kelly was one of the oldest of the long lived men who have adorned the English Bench. The following extract from the *English Law Journal* contains several instructive points in connection with the career of the late Judge.

"The interesting and instructive career of the late Chief Baron may be said to have been incomplete in one respect, and too complete in another. He ought to have died a peer of Parliament; and he ought to have left the bench four years ago. Why these two events were not brought about has not been satisfactorily explained. The party to which the Chief Baron had rendered good service was in power. It is true that the Chief Baron had suffered pecuniary losses; but, having no son, his peerage would not have called for an endowment, and the Chief Baron himself was believed to wish the elevation. It can hardly be supposed that his party were guilty of the ingratitude of forgetting a man who had served them, but whose services were no longer valuable. Retired from the bench and a peer, the Chief Baron would have found vent, without reproach, for those political utterances which, breathed into the ear of the Lord Mayor from the bench of a Court of Justice, were justly said to be out of place. It can hardly be supposed that Lord Beaconsfield, who

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possessed few more ardent admirers than the Chief Baron, thought that his presence in the House of Lords would, in any way, be embarrassing to his party. Yet, if a man who has filled, with applause, one of the four highest offices of the law, is not the man to be elevated to the peerage, it may well be asked who is. If the explanation is to be found, or partly found, in the collision between the Chief Baron and the Lord Chancellor for the time being on the question of the Privy Council, it may be said to be more an honour to the Chief Baron to have died without the peerage than if he had received it. Unless the judgment of legal history reverses the opinion of the day, the Chief Baron was in the right; and the resolution with which he maintained his opinion, in spite of the injury which he knew he was inflicting on his personal interests, is a proof of independence of spirit of more value to his reputation than a peerage would be. The mystery, equally great, why the Chief Baron was not allowed to retire, is only partly explicable as wrapt up with the question why he was not allowed a peerage. It may well have been that the Chief Baron did not feel inclined to listen to overtures for his retirement unless the offer of a peerage were a preliminary step. The maintenance of an aged judge on the bench, after the time has elapsed when he can readily perform his duties, is very bad judicial economy. This is especially the case when the judge is the president of the Court, it being an incident of his office that he should ordinarily sit with one or two colleagues. The receptive powers fade early; and a judge, who requires twice or three times as long to take in the facts of a case as when he was in full intellectual vigour, is accountable, when he sits with his colleagues, for the practical withdrawal from the public service of several judges. In such circumstances, a retirement on full pay would be a pecuniary economy to the country; and, if a necessary condition of such retirement is a peerage, it requires a strong reason for excluding from the House of Lords to justify a refusal to comply with the condition. These considerations are so obvious that the authorities who de-

clined to be influenced by them can only be assumed not to be sufficiently alive to them. The moral to be drawn, from the fact that the late Chief Baron did not retire some years ago with a peerage, is that those who control our judicial system are either not sufficiently informed of what it is their business to know, or, as is more likely, are not sufficiently alive to the duty of interference.

Reflection turns upon the Chief Baron, now that he is dead, as representing the virtues and the failings of a past judicial age. There could hardly have been a better example of the stately dignity which is among the things of the past, equally with ruffles and walking-swords. It was often said that the Chief Baron was the only judge of his time who came out becomingly from the trying ordeal of walking up the nave of St. Paul's in his full robes and with his train-bearer behind him. His faults, too, were of the old-fashioned kind, in the sense that they were on the surface; and he was not corrupted by the tendency of the day for men to deceive themselves into thinking that they are serving high objects, when they are really serving themselves. It cannot be said that the Chief Baron held the opinion, which is now everywhere professed, that patronage is an absolute trust for the benefit of the public. Whether it is more dangerous for a public man to think that, in dispensing patronage, he may serve his friends so long as the public is not injured, or for him to be ready to express the most elevated principles on the subject, and yet not always to act as if the public interest were his sole and undivided object, may be open to controversy. But the new phase, as distinguished from the old, is to be recorded. The Chief Baron perhaps showed the old-fashioned character in his absence of cynicism. Although he was far from being credulous or easily deceived, he had none of the undue suspiciousness which is a bad modern development of character. He was not one of those men who earn a cheap reputation for acuteness by professing to smell gunpowder whenever anything is put under their noses. Another trait distinguishing him from his younger brethren was his grasp of general principle in pre-

CHIEF BARON KELLY—THE COST OF LITIGATION.

ference to decided cases. The modern lawyer is too apt to run to his bookshelves for a case which has some resemblance to that in hand, although the resemblance is frequently immaterial. During the last few years some powerful intellects on the bench have directed themselves to the occupation of breaking down this unhealthy habit of the modern English lawyer; but still it is a vice of the day. During his later days, the Chief Baron seldom professed a previous acquaintance with any case that was cited to him less than forty years old. He would examine a case, when cited, by the light of the principle involved and use it as an illustration in his judgment; but his knowledge of law was founded on general rules, and was unconnected in his mind with an action which at such and such a date was brought by A. against B. and decided in a particular way, or with an obscure passage in Comyn's 'Digest.' The Chief Baron's application of law appeared to be instinctive, so deeply was he imbued with its elements. In his later days it was a common saying that, the difficulty of making him understand the facts once surmounted, the law might be left to take care of itself. It was also a frequent observation that, if the Chief Baron differed from his colleagues, the chances were that he would turn out right. His career as that of a successful lawyer is the history of a man who succeeded entirely by his own energy and his own talents. The necessity for the rising lawyer to add politics to his numerous pursuits brought him in contact with persons and events from which no credit was drawn—a fact which forms part of the history of most public men, whether lawyers or not. As a judge Chief Baron Kelly will not take rank among those who have made law or expounded it in a form which make them the highest authority on every subject touched, but he filled his high office worthily. His career and character deserve a study which is full of instruction."

SELECTIONS.

A leading topic of discussion in the London legal and lay newspapers, at the present time, is the cost of litigation. A

correspondent of the *Times* attributes the great cost of litigation to the law of evidence, and the necessity of calling and keeping in attendance a crowd of witnesses. He says:—"In former days causes were tried and witnesses examined on much stricter lines than they are now. Of late years cross-examination 'to the credit of a witness' has become an insidious cause of the protraction of trials. It has always been a rule in England not to admit secondary evidence of any fact if primary evidence can be obtained. The attendance of witnesses and the preparation of briefs for counsel and the fees of the latter are all regulated by these exigencies of the law of evidence. There appear to be two remedies for this evil: (1) A return to the old system of winnowing out each case by a process of pleading and extracting out one or two precise questions of fact which will constitute the issues to be tried, and to confine the evidence strictly to those questions; or (2) relax the law of evidence and to permit the judges and juries to consider documents and other matters of evidence, although not constituting primary evidence; and to modify the practice of the courts so as to allow of trials being postponed for such further evidence on controverted points as the judge may think necessary. The first alternative remedy would no doubt be a retrograde movement, although probably an improvement on the present state of things. I believe that the second remedy is the only one that could be successfully applied." He recommends the adoption of the French system upon the latter point. Much more conclusive is the reason assigned by another writer, who says: "Another great reason for the increase of costs nowadays is to be found in the division of the legal profession into the two branches of counsel and solicitors. Looked at by the light of reason alone, there is no logical argument whatever in support of that division. What can be more absurd than compelling a suitor to filter his case through the brains of one man into the ears of another? Even if a solicitor of talent and honesty wishes to act personally for his clients in those courts where he has equal audience he can only do so

SELECTIONS.

at a loss; for the authorized scales of costs are so arranged as to discourage this attempt at independence. Such a solicitor can get but a wretched fee for his own work, while if he employs counsel, he can pay him well, and also run up a neat little bill for himself. We doubt not but that a time will come when, all this old-world nonsense being swept away, the lawyer will be one man complete in himself, and not, as at present, two people chained together by an absurd custom, and compelled, for their own profit, to make as much as they can out of their unhappy clients.—*Albany Law Journal*.

In *Shepard v. Wright*, New York Supreme Court, June, 1880, it was held by Von Vorst, J., that a judgment recovered in Canada against a person residing in this State, without the service of process in Canada or appearance by the defendant, will not support an action in this State, although the defendant may have been a citizen of Canada, and although a copy of the bill of complaint was served on the defendant in this State, which according to the laws of Canada gave the court of that country jurisdiction to render judgment there. The court observed "But the learned counsel for the plaintiff urges that the service upon the defendant at Chautauqua county of a copy of the bill of complaint, under the laws of Canada, gave the court jurisdiction of the person of the defendant. I cannot agree with him in such contention. No sovereignty can extend its powers beyond its own territorial limits to subject either person or property to its judicial decision. Every exercise of authority of this sort, beyond this limit is a nullity. Story on Conflict of the Laws, § 539. The jurisdiction of State courts is limited by State lines. *Ever v. Coffin*, 1 Cush. 23. This last case states that 'upon principle it is difficult to see how an order of a court, served upon a party out of the State in which it is issued, can have any greater effect than knowledge brought home to the party in any other way.' A citizen of one State or country cannot be compelled to go into another State or country to litigate a civil action by means of process served in his own State or country. And a

judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognised beyond the State in which the action originated. Freeman on Judgments, §§ 564, 567. In *Holmes v. Holmes*, 4 Lans. 392, it is held that in order that the court have jurisdiction of the person of the defendant, it is necessary that the defendant be served with the process of the court, or voluntarily appear in the action, and 'that such service of process can only be made within the territorial jurisdiction of the court.' *Dunn v. Dunn*, 4 Paige, 423; *Ex parte Green v. Onondaga Com. Pleas*, 10 Wend. 592; *Fogler v. Columbia Ins. Co.*, 99 Mass. 267." "The comity due to the courts of other countries is urged as a ground for a recovery here upon this judgment. The courts of this State do recognise foreign judgments as binding here, when the record shows that the courts rendering a judgment had jurisdiction of the subject and of the person of the defendant, and give full credit to such judgments by refusing to retry the matters when once determined in an action where the foreign courts had acquired such jurisdiction. We go no further with respect to judgments of a sister State." The same doctrine was held by the Supreme Court of Michigan, on a very careful and extended examination, in *McEwan v. Zimmer*, 38 Mich. 765; S. C., 31 Am. Rep. 332.—*Albany Law Journal*.

In *Armstrong v. Kleinhans*, Louisville Chancery Court, 1 Ky. L. Rep. 112, the plaintiff carried on the clothing business at 150 West Market street, Louisville, in a leased building with an observatory, which was called the "Tower Palace," and advertised his business under that name by signs and publications. Subsequently he removed to West Jefferson street, to a building with no tower or observatory, and continued the designation "Tower Palace." After his removal the owner of the first premises himself carried on the carpet business there under, under the name of "Tower Palace Carpet Store." Later he rented the premises to defendants, who carried on the clothing business, under the designation, "Tower Palace." The

plaintiff filed a bill to restrain defendants from the use of that designation, but the bill was dismissed. The Court said: "Plaintiffs insist that the house is not a palace nor the observatory a tower. But while this is true, we are compelled to speak with entire accuracy, and although the plaintiff has proved by an architect that the 'tower' is not a tower, but has been called a 'chicken-coop,' yet I think it is too much to expect of men that in naming a conspicuous building they shall not be allowed to use the language of compliment. And it seems to me that a fine house may be called a palace, and that the ornament on a high building like this may be called a 'tower;' and that 'tower-palace' is not in the language of compliment a too exaggerated name for this particular structure. The newspaper, in describing the plaintiff's opening, called particular attention to this tower, setting forth its command of all the territory adjacent to Louisville. It is to be observed that the sign on the tower was simply 'Tower Palace,' and not Tower Palace Clothing House, and it is further proved that the iron slab at the front door has the words 'Tower Palace' cast in it. I think this name was suggested and adopted as appropriate to this particular building, and was given to the building itself, and that it does not matter who first called it 'Tower Palace.' What is true of the name of an article must be equally true of the name of a building. It would be unjust to its owner to limit him as to his tenants, or to prevent him from taking a proper advantage of its notoriety. No new tenant has any right to deceive the public into thinking the building is still occupied by a former tenant. But in so far as the public are deceived by the fact that the name of the building continues to be used, such misleading cannot be avoided, any more than a belief that the first firm that manufactured 'Paraffine Oil' or 'Essence of Anchovies' will continue to exclusively supply the market with these articles. To make this even plainer, suppose a house built of red granite called by its first tenant Red-Granite House, or of brown stone so named Brown-Stone Palace, could such a tenant move away his business and

sign to a brick house or a frame house and prevent all other tenants from calling the houses by their appropriate names? I am not willing to put this case solely on the ground that the name 'Tower Palace' was appropriate or descriptive of this building. I am inclined to think that whatever name had been given must adhere to it." See "Antiquarian Book-Store" case, *Chognaki v. Cohen*, 39 Cal. 501; 2 Am. Rep. 476; "No. 10 South Water street" case, *Glen & Hall Manufacturing Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278.—*Albany Law Journal*.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
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COURT OF APPEAL CHAMBERS.

MOSS, C. J.]

[Sept. 25.]

GRANT V. VAN NORMAN.

County Court appeal—Jurisdiction—Chamber order.

Holman moved for leave to set down this case by way of appeal to the Court of Appeal from the County Court of the County of Brant, notwithstanding that the time for damages, as limited by Rule 40 of the General Orders of the Court of Appeal, had expired. The appeal was sought to be had from an order made in Chambers by the Judge of the County Court, discharging a summons to set aside an attaching order previously made by himself, it being objected that no appeal lay from an order such as has been made in this case.

Counsel for appellant cited the judgment of Proudfoot, V.C., in *Van Norman v. Grant*, 27 Grant, 500, and R. S. O. c. 50, s. 200, as authority to show that the matter was appealable.

Aylesworth, in opposition to the application, pointed out that nothing said by the learned Vice-Chancellor in *Van Norman v. Grant* went the length of holding that an appeal to the Court of Appeal could be entertained, and that a reference to section 200 of the C. L. P. Act at once showed that it had no application whatever to a case like the present, but had reference solely to

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matters of award. The origin of the section, 40 V. c. 7, schedule A. (84), placed the question perfectly beyond doubt, and *Re Freeman, Craigie v. Proudfoot*, 2 E. & A. Rep. 109, was entirely in point as showing that no right of appeal existed.

Moss, C. J., refused the application, holding that the matter was not appealable, and that section 200 of the Revised Statutes, c. 50, in no way whatever affected the question.

QUEEN'S BENCH.

VACATION COURT.

KNOTT V. THE HAMILTON & FLAMBORO' ROAD COMPANY.

Galt, J.] [Sept. 28.
Road Co.'s Act (R. S. O. ch. 152)—Roads completed and tolls established—Extensions—Right to collect tolls.

The provisions of the "General Road Co.'s Act" (R. S. O. ch. 152), respecting the extension of roads, apply to roads which have been constructed and completed, and tolls established thereon.

In this case the extensions were new constructions within the City of Hamilton, and measured separately were less than two miles, though the distance of the original road and the extension together much exceeded two miles. *Held*, that the defendants were entitled to exact toll therefor.

No toll-gate had been maintained for nearly nine years on the portions of the road within the City of Hamilton. *Held*, that defendants could, nevertheless, under sec. 89 of the Revised Statute, erect and maintain a toll-gate thereon, and exact toll from the travelling public.

McKelcan, Q.C., for plaintiff.

Robinson, Q.C., *contra*.

COMMON PLEAS.

VACATION COURT.

[October 8, 1880.]

NAGLE V. TIMMINS.

Insolvency—Maliciously suing out demand for assignment—Damages—Pleading.

Held, by GALT, J., that an action will lie by a debtor to recover damages against

a creditor who has falsely and maliciously made a demand for an assignment under the 4th sec. of the Insolvent Act of 1875, and amending Acts, and that the penalty for so doing is not confined to the question of costs under sec. 5 of the Act.

To such an action, the defendants pleaded a plea which, after setting out a variety of dealings between the parties, showing that from time to time the plaintiff failed to meet his engagements with the defendant, concluded that the plaintiff being indebted to the defendant in the sum of \$1,400, and being unable to pay the same or to meet his engagements, &c., the defendant *bona fide* believing the plaintiff to be insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and having reasonable and probable cause for so believing, and without malice, made a demand on the plaintiff, &c.

Held, plea good.

Bethune, Q.C., for the plaintiff.

Robinson, Q.C., for the defendant.

MCCARTHY V. ARBUCKLE.

Arbitration—Master's certificate—Time to move against—Appeal.

In this case, on the parties being brought before the Court, in accordance with the judgment of the court, as reported in 31 C. P. 48, and being made parties to the action, it was objected that the application to refer back the Master's report was too late, not having been made until after the lapse of two terms from the making thereof.

Held, by GALT, J., that this was not a reference within 9 & 10 Wm. III. ch. 15, but that it came within the 210th section of R. S. O. ch. 50, as being a report or a certificate made under a compulsory reference, and under the 209th sec. of the Act, should have been moved against within the first six days of the term following the making thereof.

Held also, that even if looked upon as an appeal from the Master's report, the evidence did not justify the interference of the court.

Snelling, for the plaintiff.

Hall, for the defendant.

Chan.]

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[Com. Law Cham.]

CHANCERY,

ROGERS V. LOWTHIAN.

Proudfoot, V.O.]

[Sept. 10.]

Will, construction of—Life interest.

A testator bequeathed to his two daughters (both of whom were married and had children at the date of the will) the sum of \$1,000 each, charged upon his realty, which he devised; the money to be invested in bank stock, and the interest accruing therefrom to be paid to them during their natural lives, and afterwards such sums to be equally divided amongst their heirs. By a codicil the testator directed that should his real estate be sold, the \$2,000 might remain on mortgage, at interest, payable half yearly to the daughters, and when the mortgage should be paid his executors were to have full power to invest that sum in homesteads for his daughters, should they desire to do so. *Held*, that the daughters took a life estate, with remainders to their heirs as purchasers.

WILLIAMSON V. EWING.

The Chancellor.]

[Sept. 29.]

Sale of business—Restraint of trade—Account—Pleading—Practice.

E., carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to W., and by the agreement covenanted "not to open or start a retail or photographic business of a similar character" in the City of Toronto for five years. By a subsequent agreement the first was modified, so as to allow E. to sell in any manner to persons residing out of Toronto, and to sell retail in Toronto on allowing W. a percentage on the prices realized. W. filed a bill alleging that E. had, prior to such second agreement, sold goods in contravention of it, and had subsequently sold to a large amount; and prayed an account and payment of his percentage. The Court being of opinion that such second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the Master, although the answer professed to state the actual amount of sales, and the case was heard on bill and answer.

SIMPSON V. HORNE.

The Chancellor.]

[Sept. 29.]

Executors—Costs.

When an executor, by his misconduct in the management of an estate, causes a suit, and but for the circumstance of such having been brought the assets would have been dissipated, the Court will not, as a general rule, allow such executor his costs out of the estate, although no loss has been sustained; but where, in such a case, the widow of the testator filed a bill without calling upon the executor for an account, or affording him any opportunity of showing that his dealings were correct, the Court (Spragge, C.) refused the costs up to the hearing, reserving the subsequent costs till after the Master's report.

The Chancellor.]

[Sept. 29.]

MEALEY V. AIKINS.

Will, construction of—Lapsed legacy.

A testator bequeathed an amount of stocks to his brother John "to have and to hold to him, his heirs and assigns for ever." John predeceased the testator. *Held*, that the legacy lapsed, and that the next of kin of the legatee was not entitled.

COMMON LAW CHAMBERS.

Osler, J.]

[Aug. 28.]

BANK OF COMMERCE V. TASKER.

Interpleader—Costs.

A sheriff having made a seizure of goods under a writ of execution placed in his hands, and a claimant to the goods having appeared, the execution creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff the execution creditor abandoned his claim.

Held, that the execution creditor might abandon at that stage of the proceedings without costs, and no order was made as to the costs of the sheriff.

*Helman for the claimant.**Aylesworth for the execution creditor.**Proctor (W. Mulock) for the sheriff.*

Cameron, J.]

[Sept. 12.]

HENDERSON V. HALL.

Alien defendant outside jurisdiction—Service—Amendment.

In an action against a defendant residing out of Ontario and not a British subject, a copy of the writ of summons itself instead of the notice of the writ required by section 50 of the C. L. P. Act had been served on the defendant.

Held, that no powers of amendment were given such as would enable service in one method to be substituted for service in another method, especially where the express language of the statute directed that the writ should not be served, but that a notice thereof should be. The copy and service of the writ were therefore set aside with costs.

Holman for plaintiff.

Aylesworth for defendant.

WATSON V. McDONALD.

Osler, J.]

[Sept. 13.]

Commission—Viva voce examination.

Where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken on *viva voce* questions, instead of upon interrogatories.

Aylesworth, for plaintiff.

Ogden, for defendant.

HAY V. MCARTHUR.

Mr. Dalton, Q.C.]

[Sept. 20.]

Mortgagor and mortgagee—Ejectment—Chancery, concurrent suit in—Costs.

A mortgagee proceeded in ejectment against a mortgagor, and at the same time filed a bill in Chancery against him for a sale.

Held, that as the mortgagee could, since the Administration of Justice Act, R. S. O. c. 49, obtain in the Chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed forever.

H. J. Scott, for defendant.

Aylesworth, for plaintiff.

EMMENS V. MIDDLEMISS.

Mr. Dalton, Q. C.]

[Sept. 23.]

Inspection of documents—Mortgage.

An action was brought upon the covenant contained in a chattel mortgage which covered goods in the United States and which was not registered in Ontario. An application for an inspection of the deed was made, and the plaintiff contended that a mortgagee could not be compelled to allow the inspection of his mortgage by the mortgagor while it remained unpaid, and that the clauses in the C. L. P. Act authorized inspection only in cases where a bill would lie in equity for a discovery prior to the passing of the Act.

Held, that there is jurisdiction, irrespective of the Act, to order inspection of any document sued upon.

J. B. Clarke, for plaintiff.

Aylesworth, for defendant.

CHANCERY CHAMBERS.

The Referee.]

Blake, V.C.]

WRIGHT V. WAY.

Supplemental answer—Time—Matter introduced by.

The bill alleged that defendants had given plaintiff certain promissory notes in part payment of the purchase money of a vessel, and had given a mortgage containing a covenant to pay the amount covered by the notes on the vessel as collateral security. The answer of the defendant Honey, filed in November, 1879, admitted, while that of the defendant Way denied this state of facts. On the 9th March, 1880, defendant Honey applied for leave to file a supplemental answer setting up that the notes were given for the plaintiff's accommodation; that there was an agreement that no liability in respect of them should ever be enforced by the plaintiff against the defendants, and denying that the mortgage was given as collateral security. The defendant Honey, by affidavit filed, explained that when he swore to his former answer he had forgotten the true

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state of the facts, as they had occurred some years before, but he had remembered them after having a conversation in the beginning of February with his co-defendant.

The Referee refused the application. BLAKE, V.C., dismissed the appeal with costs, without prejudice to any application that might be made before the Chancellor at the hearing.

McPhillips, for defendant.

Hoyles, for plaintiff.

The Referee.]

Blake, V.C.]

WRIGHT v. WAY.

Service of papers.

This case was set down to be heard at Cobourg sittings on 6th April. Notice of examination and hearing was served on solicitors of defendant Honey on 22nd March, at a few minutes past four, who admitted service, but the same day discovering that the notice had been served within fourteen days of the hearing. They wrote to the plaintiff's solicitors repudiating their admission, and saying that they would move to set aside the notice.

The Referee refused to set aside the notice, with costs to be costs in the cause to the plaintiffs in any event.

BLAKE, V.C., dismissed the appeal of the defendant Honey with costs.

McPhillips, for defendant Honey.

Hoyles, for plaintiff.

Proudfoot, V.C.]

DRAGGON v. DRAGGON.

DRAGGON, ABEL v. DRAGGON.

Administration—G. O. 638—Who entitled to.

D. died intestate and one of his creditors served notice of motion for an administration order under G.O. 638 on D.'s widow, the administratrix of estate. The widow then served notice of motion for a similar order upon the heirs of her husband, and filed affidavits alleging a deficiency of the personalty to pay debts that creditors were pressing, that some had taken proceedings to enforce payment of their claims, and also filed a consent of the adult heirs to an order being made in her favour.

The Master at Chatham granted an administration order to the widow.

On appeal, PROUDFOOT, V.C., upheld the Master's order and gave liberty to the creditor to add the costs of his application for administration to any claim he might establish against the estate.

Riordan, for creditor, appellant.

Hoyles, for administratrix, defendant.

Proudfoot, V. C.]

[June 4.]

Re JOHN THOMAS SMITH.

Construction of will—What "capital" and what "profits"—Under bequest to A for life.

By his will, a testator, who at his death owned fifty-four shares of stock in the Consumers' Gas Company, bequeathed among other things as follows:—"I further bequeath to my dear wife, during the term of her natural life, the interest, dividends and profits, which shall or may arise from time to time from the stock or shares which I shall be the holder of or entitled to for my own use at the time of my decease, in the Consumers' Gas Company, of Toronto, The Dominion Bank, and the Ontario Bank, and the dividends, interest and profits, of the moneys or other securities into which the said several stocks may from time to time be changed or converted under the provisions of my will and codicil in that behalf; and I hereby direct my said executors and trustees to pay the said interest, dividends and profits, to my said dear wife Anne, during her natural life accordingly."

Two years after testator's death, the Gas Company issued new stock at par, and notified the executor that there had been allotted to him eighteen shares of said new stock of \$50 each, being in proportion of one to every three of those standing in his name, and that any shares not accepted would be sold by public auction, for the benefit of the parties to whom the same were allotted; and the premium, if any, on the same, placed to their credit.

The executors not having funds to pay for the new stock the shares were sold, and produced a premium of \$226.67.

Held, that the \$226 67 was principal, and that the tenant for life was entitled only to the interest on it during her life.

NELSON v. DEFOE.

Proudfoot, V.C.]

[June 5.

Writ of arrest—What necessary upon application for, in suit for specific performance.

A writ of arrest will not be granted against the purchaser in a suit for specific performance unless it be shown by affidavit that the vendor's lien is insufficient.

Seaton Gordon, for plaintiff.

McKAY v. McKAY.

Proudfoot, V.C.]

[June 5.

Partition—Creditors—Certain costs of administration allowed.

An order for partition or sale was made under the recent G. O. 640, by the Master at London, for partition or sale of the estate of John McKay, deceased. In proceeding under that Order, the Master advertised for creditors, and among the claims sent in was one of Messrs. M. & M., solicitors, consisting of charges for obtaining letters of administration and for defending an action in the Court of Common Pleas v. the Administratrix. The plaintiff in that action is the present appellant, William McKay, a defendant in this suit, and entitled to a share of the estate. The Master allowed the claim. William McKay appealed, on the ground that the deceased was not, nor is his estate, indebted to M. & M. in any sum whatever, and they are not entitled to prove as creditors in this cause.

Appeal dismissed with costs.

Hoyles for the appellant.

R. Meredith for M. & M., the creditors.

SCOTT v. VOSBURG.

Proudfoot, V.C.]

[June 5.

Timber on mortgaged property—Sale of, by third party—Proceeds to whom payable.

There were three mortgagees of a property. The first filed a bill for sale, the other two proving their claims in the suit in the Master's office, and the report ap-

pointed a day for redemption. No one redeemed, but a final order for sale was not taken, and because one Vosburg, who had purchased the equity of redemption, was negotiating as to Scott, the third mortgagee, becoming sole mortgagee of the property.

During the negotiations Vosburg cut and sold a large quantity of the timber on the land to G. & W. Scott then filed a bill praying *inter alia* payment by G. & W. of the price of the timber cut and sold them which had not yet been paid over.

On the reference, the Master in ordinary held, under *McLean v. Burton*, 24 Grant, 136, and *Brown v. Sage*, 11 Grant, 239, that G. & W. should pay the value of the timber sold them to the first mortgagee.

On appeal, PROUDFOOT, V.C., upheld the Master's judgment.

Roaf for plaintiff.

Dafoe for first mortgagee.

Eddis for defendant.

MACDONELL v. MCGILLIS.

Blake, V.C.]

[June 8.

Jurisdiction of Master under G. O. 640—Question of title raised.

The jurisdiction created by G. O. 640 is intended to be exercised in simple cases only, where there is no dispute. Where questions are raised of title or the like a bill must be filed.

Blain, for plaintiff.

Hoskin, Q.C., for infants.

Cattanach, for adult defendants.

Proudfoot, V.C.]

[Oct. 13.

PHERRILL v. FORBES.

Service of bill by publication—G. O. 100, 436, and 645—Decree—Practice.

Motion for a direction to the Registrar to issue a decree on proceipe.

The bill had been served by publication, the notice being in the form Schedule C to G. O. 100. The time to answer having expired, plaintiff applied for proceipe decree, verifying his claim by affidavit.

Registrar refused to issue decree because the special endorsement provided by Sche-

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dule G to G. O. 436 had not been incorporated in the notice published.

It was contended that order 646 was intended to dispense with the long notice, as it provided that plaintiff must produce an affidavit verifying his claim, which was not done in ordinary cases, where defendant was served in person.

Held, that Registrar's course was correct, and that as defendant had no knowledge of the amount claimed by the plaintiff from the notice served, the case must be set down for hearing *re confesso*.

W. Fitzgerald for plaintiff.

Proudfoot, V.C.]

[Oct. 13.]

CLEGHORN V. WILSON.

Injunction—Dismissal of bill—Effect of.

A motion to continue an injunction was returnable to-day. A countermand of the notice of motion and a copy of an order dismissing the bill had been served by plaintiff on defendant; but, nevertheless, counsel for defendant appeared and moved for an order to dissolve the injunction.

The learned VICE-CHANCELLOR thought that when the bill fell all proceedings under it fell also; but leave was given to renew the motion if on further consideration counsel desired to do so.

Hoyles for defendant.

Proudfoot, V.C.]

RE ROMANES V. SMITH.

Rev. Stat. Ont. ch. 109, s. 3—Estate.

A testator devised lands to his executors "To hold the same in trust for the use and benefit of my son William during his lifetime, and after the death of my son William, in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of my said son William taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion."

Held, that William took an estate for life, and the legal estate in remainder vested in the trustees for the benefit of his heirs.

Black for purchaser.

Moss for vendor.

CANADA REPORTS.

SUPREME COURT REPORT.

LENOIR V. RITCHIE.

Great Seal case—Appointment of Queen's Counsel.

The following is a translation of the judgment of Fournier, J. pronounced in the French language, viz. :—

FOURNIER, J. — The respondent J. N. Ritchie, a barrister of the Nova Scotian bar, was appointed a Queen's Counsel by letters patent, under the Great Seal of Canada, on the 26th of December, 1872.

On the 7th of May, 1874, the Legislature of Nova Scotia passed two Acts, chapters 20 and 21—the first, authorizing the Lieutenant-Governor to appoint Queen's Counsel for that Province—the second, giving him power to regulate the order of precedence between them.

On the 27th of May, 1876, the appellants and several other members of the Nova Scotian bar were appointed Queen's Counsel, by virtue of letters patent, giving them rank and precedence over the respondent. The prothonotary of the Supreme Court of Nova Scotia, having thought he ought to conform to these letters patent, in preparing the roll of barristers, assigned to the appellants and others, a precedence over the respondent, which none of them had had before. The latter having obtained from the Court on the 3rd of January, 1877, a rule to restore and maintain him in the order of precedence which he had since the 26th of December, 1872, the date of his letters patent.

It is from the judgment making this rule absolute, that the present appeal is brought.

The principal questions raised in this cause are: First, whether the judgment rendered upon this rule on the 26th of March, 1877, is susceptible of appeal to this Court; second, whether chapters 20 and 21, of 37 Vict., of the Statutes of Nova Scotia, are beyond the jurisdiction of the Legislature; third, whether these Acts can have a retrospective effect, affecting the position of Queen's Counsel appointed by letters patent, issued under the Great Seal of

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Canada, before the passing of the two Statutes in question.

One other question, to which considerable importance has been attached—that of the validity of the Great Seal with which the letters patent of the 7th of May, 1876, were sealed—having been settled, pending the suit, by two Acts, one of the Federal Parliament, and the other of the Legislature of Nova Scotia, need not now be discussed. I shall content myself with saying that I share the opinion expressed on this subject by the Chief Justice, Sir William Young.

After having had much doubt on the question, whether there is a right of appeal from a judgment rendered in a proceeding commenced as this has been by a motion for a rule nisi, I have come to the conclusion that this Court has jurisdiction in such a case, where the judgment which it shall give, whether it be to affirm or reverse the judgment appealed from, is one that may be put in execution.

In effect the 17th section, defining the appellate jurisdiction of this Court, has not declared that the appellant's exercise of that right shall depend upon the mode of procedure adopted in the Court of first instance, to enforce his rights. The word "case," employed in that section is not synonymous with "cause," it has a wider signification, and is applicable to all the procedures by means of which one arrives at a judgment upon his rights, in a Court of superior jurisdiction.

In order to give the same right of appeal in all the Provinces, it was necessary to employ an expression of as wide a signification as that. If that right had been given according to the nature of the mode of procedure, or action, the result would have been, that in certain cases, by reason of the difference of the systems of procedure existing in the different Provinces of the Dominion, a judgment upon the same question would be liable to appeal in one Province and not in another. It is without doubt to avoid a like inconvenience and to give, saving certain restrictions, the right of appeal in the general manner which the 17th section of the Supreme Court Act declares, in using this very vague expression,

that there is an appeal in cases where the following conditions are found, namely:—

First, that the judgment which one wishes to appeal is a final judgment of the highest Court of last resort; secondly, in the case where the judgment is one of a Superior Court exercising a jurisdiction in the first instance, or by way of appeal, but in which the decision would be final. In order that there may be an appeal, it suffices that one or other of these conditions are found, whatever otherwise may be the manner of proceeding which may perchance be employed to arrive at a judgment. The meaning of the word "case" employed in our Act, is at least as wide as that of the word "suit," which is found in the 25th section of the Supreme Court Act of the United States, and of which Marshall, C. J., has given the following definition:—"The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a Court of Justice, by which an individual pursues that remedy in a Court of Justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a Court of Justice, the proceedings by which the decision of the Court is sought is a suit" (*Weston v. City Council of Charleston*, 2 Peters, 464).

And Story on the Constitution of the United States, vol. 2, No. 1125, p. 485. "What is a suit? We understand it to be the prosecution, or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of Justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' The instruments whereby this remedy is obtained, are a diversity of suits, and actions, which are defined by the Mirror to be the 'lawful demand of one's right;' or as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio, quod alicui debetur*."

Now the judgment in question in this cause being final, at least upon the present procedure, and rendered by a Superior Court (the Supreme Court of Nova Scotia)

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deciding in the last resort—this judgment is found in this respect to fulfil the conditions rendered necessary by the Statute that there may be an appeal. In two cases the proceedings having been commenced, as in the present case, by motion, this Court has already decided that there is a right of appeal—these are the cases of *Wallace v. Bosom*, 2 Q. S. C. R., 488, and *Wilkins v. Geddes*, 3 Q. S. C. R., 303.

Therefore for these reasons I should be disposed to consider the judgment as susceptible of appeal, if, in addition to these, there are found two other conditions that I consider essential to give jurisdiction; that is, first, that the judgment has not been rendered in the exercise of a discretionary power which the courts exercise for the conduct of business and the maintenance of order during their sittings; and second, that the judgment rendered was susceptible of being put in execution.

To ascertain whether these two conditions exist in the present case, it is necessary to recall the terms of the motion which was the foundation of the judgment: What is, according to the motion, the object of contestation—the *matter of record*? It is the demand of precedence which the respondent makes in these terms: "That it be ordered that the rank and precedence granted to the said Joseph Norman Ritchie by said letters patent of 26th December, A.D. 1872, be confirmed, and that he have rank and precedence in this Court over all Queen's Counsel appointed in and for the Province of Nova Scotia since the 26th December, A.D. 1872." That is the demand; then follow the reasons, given in its support. It reduces itself then exclusively to the question of precedence over the Queen's Counsel appointed since the 26th December, 1872, in and for the Province of Nova Scotia, although the reasons invoked to give effect to this contention attack the validity of the two statutes by virtue of which these appointments have been made. But it is not these propositions of law which constitute the demand. Even though the judgment upon this motion may be a recognition of the right of the respondent to precedence over the appellants, it would not in the least

disturb the existence of the letters patent conferring on them the distinction of Queen's Counsel. In effect we cannot probably declare them void except by means of a *scire facias*, or perhaps a *quo warranto*; in any case, one cannot attain that end, except by a procedure specifically demanding the annulment of the letters patent. Every procedure of that kind would necessarily be long, and would necessarily be a proceeding instituted by the Crown. The better mode of putting an end, at least temporarily, to a conflict which might manifest itself before the Court, and to avoid the disagreeable consequences of it, would be, without doubt, to address oneself to the summary jurisdiction of the Court concerning the conduct of business, the maintenance of good order, and the discipline to be observed during the sittings of the tribunal. It is that which has been done, in adopting the procedure which has been followed in this case. But in the exercise of that power, the decisions of the Superior Court are without appeal: they escape all revision save that of the Judicial Committee of Her Majesty's Privy Council whenever either fine or imprisonment has been awarded. I think for that reason that the appeal ought not to be entertained.

Another reason which induces me to think that, in the present case, there ought not to be an appeal is, that the judgment of this Court, which should reverse that of the Superior Court of Nova Scotia, would be incapable of being executed.

It is a general principle by which this Court is bound as well as all other tribunals, that a Court has not jurisdiction in any case where the judgment which it might give would not be susceptible of execution. In order that a judgment may be executable, it is necessary that the Court have powers to put the demandant in possession of that which is the object of his demand, or in default, to accord to him a pecuniary indemnity, or, that it have power to pronounce a condemnation of imprisonment against the recalcitrant party.

In order to see the difficulty, not to say the impossibility, of executing the judgment of the Court, supposing that it re-

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venes the judgment of the Court of first instance, and that it awards to the appellants the right of precedence which they claim over the respondent, let me ask, What would happen in such case? How and against whom would they execute the judgment? Would they be able to issue a writ addressed to Sir William Young, the Chief Justice of the Superior Court, to enjoin him to recognise the precedence of the appellant? And if he refused, would there be issued against him an order for contempt of court? Judgments are executed against the parties and not against the judges. Would the appellants have the least means of forcing the respondent to desist from his precedence or to compel him to refuse to reply to the question which might be addressed to him by the Chief Justice, notwithstanding our judgment? Certainly not; the judgment would in this case be nothing but an expression of opinion which would remain a dead letter.

If I may not presume that an inferior Court will refuse to execute the judgments of this Court in ordinary cases because they may be contrary to their own,—I may not be wrong in thinking that in a case like this when it acts in the exercise of a discretionary power, which is not subject to our control, it would think itself justified in not conforming to it, in order to preserve intact its prerogatives and discretionary power. In the case supposed, we shall be exposed to seeing the Supreme Court of Nova Scotia, notwithstanding our contrary opinion, maintaining its own decision. Nothing of that kind could have happened, if instead of addressing the disciplinary jurisdiction of the Court, the validity of the letters patent had been attacked by *acte facias*. In that case the judgment would be executed as all others, and there would not be any possible conflict between the two Courts. I should be induced by these reasons to declare that this Court has not jurisdiction, and that it ought to abstain from judgment. But as I am under the impression that I am alone in entertaining this opinion, I shall briefly give the reasons

of my decision upon the merits of the question submitted.

After Confederation, difficulties arose in the Provinces of Ontario and Nova Scotia, on the subject of the power of the Lieutenant-Governor to appoint Queen's Counsel. This question affecting the Royal prerogative was for this reason referred by the Privy Council of Canada, to the Secretary of State for the Colonies, in order to obtain the opinion of the law officers of the Crown. The memorandum of the Privy Council, signed by Sir John Macdonald, after having cited paragraph 14 of section 92 relative to the organization of the Courts, contains the following declaration:—"Under this power, the undersigned is of the opinion that the legislature of a Province, being charged with the administration of justice and the organization of the Courts, may, by statute, provide for the general conduct of business before those Courts; and may make such provision with respect to the Bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of precedence, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the Royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation."

To this part of the memorandum, the Colonial Secretary, Lord Kimberly, made the following reply, which may be found in his despatch of the 1st February, 1872:—"I am further advised that the Legislature of a Province can confer by Statute on its Lieutenant-Governor, the power of appointing Queen's Counsel; and with respect to precedence or pre-audience in the courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and Lieutenant-Governor, as above explained."

The Chief Justice, Sir William Young, in the reasons of his judgment in this cause, speaking of the effect of that correspondence upon the two Acts in question, expresses himself thus: "Among the grounds taken

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in the rule, it is urged that the 20th and 21st chapters of the Provincial Acts of 1874 are *ultra vires*, and the appointments therein invalid and of no effect. But the Crown, through its Secretary of State, having authorized such enactments, and the Acts having gone into operation, this contention is quite untenable."

The decision of this case not requiring it, I shall not examine the question whether the reply of Lord Kimberley, making known the opinion of the law officers, should be considered as importing at the same time a sufficient consent on the part of Her Majesty to authorize the legislation which followed it. Suffice it to say, that I recognise the wisdom of the rule which presumes in favour of the legality of legislative Acts, and which compels the tribunals to examine the question of their validity only in those cases where the solution of the question submitted to the Court imperiously requires it. The present cause does not present one of those cases, and the rule to which I have referred ought here to receive its application. The question to be decided here, is not so much whether the Acts in question are *ultra vires*, but rather whether one of them, chapter 21, can have a retroactive effect, affecting the letters patent of the 26th December 1872 granted to the respondent. It is, in consequence, quite useless to occupy oneself with the constitutionality of these two Acts, and one could not do it in the present case without violating the rule above mentioned. For this reason, I shall abstain from pronouncing on the validity of the Acts which are attacked, limiting my observations to the question of retroactivity raised as to chapter 21. The second section of the chapter is in these terms: "Members of the bar from time to time appointed after the 1st day of July, 1867, to be Her Majesty's Counsel for the Province, and members of the bar to whom from time to time, patents of precedence are granted, shall severally have such precedence in such courts as may be assigned to them by letters patent, which may be issued by the Lieutenant-Governor under the Great Seal of the Province." The appellants pretend that the terms of this section give an absolute power to the Pro-

vincial Government to assign to Queen's Counsel, who shall be appointed by virtue of that Act, rank and precedence over those previously appointed by Her Majesty or Her representative. This interpretation is certainly erroneous. The section is worded in terms which are designed to give effect to laws for the future only. It does not contain even one of those expressions ordinarily employed to give them a retroactive effect. To admit the retroactivity of this law, would be a violation of the following general rule of interpretation: "It is a general rule that all Statutes are to be considered to operate in future, unless from the language a retrospective effect be clearly intended." It would be useless to cite authorities here for this principle. It is enough to say, that I rely on the numerous authorities cited in the case of *The Queen v. Taylor*, 1 S. C. R., 65, decided by this Court, upon the retroactive effect sought to be given to a section of the Act which constitutes this Court.

Relying on these authorities, I am of opinion that the section of chapter 21 above cited, has no retroactive effect; that the letters patent giving rank and precedence to the appellants ought not to have any more effect than the Act itself, nor to affect in any manner the position of the respondent. I am, in consequence, of opinion, that the appeal ought to be dismissed with costs.

COUNTY COURT OF THE COUNTY OF ELGIN.

IN THE MATTER OF W. E. ROGHE, Insolvent.

Insolvency—Contestation.

An infant son claiming to prove a debt for money lent against the estate of the insolvent, his father, disallowed, on account of the doubtful character of the evidence in support of the claim, and that no books were shown as proving credits given to the son for the alleged loans, and that subsequent payments alleged to have been made on account of the supposed debt were not charged by the insolvent to the son, or credited by the son to the father.

[St. Thomas, Oct. 5.]

The claimant set up a claim against the estate as for money lent. He had been a

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school-teacher, and alleged that moneys received by him in that capacity had been either sent by letter or were handed to his father. None of the letters were produced, nor were there any letters proven setting forth acknowledgments of the receipt of such by the insolvent. The insolvent kept books shewing receipts of moneys from various persons in the course of his business as a merchant and miller, but none as received from the claimant. It was alleged that \$300 at one time was paid in one sum to the insolvent by the claimant, when claimant asked for a note, but which the insolvent refused to give, stating that if the claimant could not trust his own father he might lend his money to some one else. The only evidence in support of the claim was that of the claimant and of his father and mother, who all swore to the loan of the moneys, and the same were advanced in different sums at various times, and that the insolvent was to pay the claimant ten per cent. interest for the use of the moneys. The other facts of the case appear in the judgment. The claim was contested by a creditor on behalf of the estate.

HUGHES, Co. J.—After the best consideration I can give to this case, I am unable to say that I am quite satisfied of the *bona fides* of this claim for the following amongst other reasons, viz.:

1. I have carefully looked over the books of the insolvent, and find various entries in them of cash received during the course of his business as a merchant and a miller, and I can find none which corroborate the evidence given in support of this claim; so that without an entry of a dollar, crediting his son with money alleged to have been loaned to him, the insolvent comes here to support the claimant's allegation, although there are various entries of cash received from many other persons, which appear to be duly credited, but none received from him.

2. The claim is sought to be substantiated by bringing before me some loose leaves detached from an old diary of the insolvent and an old pass-book, which it is alleged were found tossing about the house of the insolvent by his younger son just before the evidence was taken by me in this matter, and I may say, with reference to them, that they bear a very dubious and unsatisfactory appearance, as presenting evidence of the *bona fides* of the claim set up by this young man against the estate of his father.

3. The son was and is still a minor, and it does not seem to me probable, that if he lent his father money, and the father had refused to give him a note or memorandum acknowledging his indebtedness, and agreeing to pay ten per cent. interest for its use,

that he would have taken an old diary of his father's—as he said he did, and contented himself with the entries which now appear; and afterwards have left the book (such as it is) to be tossed about his father's house; in other words, it is too much to expect me to believe it, and I must simply say I do not believe that any one, with the sense and intelligence this young man appears to possess, and the shrewdness and care most young lads exercise about their first personal earnings, would leave the evidence of such a disposal of money as alleged here, to go out of his hands, into the custody or within the reach of his debtor, even although his own father were (as it is alleged here was the case) that debtor, and more especially as he had had the shrewdness to ask for a promissory note and acknowledgment of the debt and been refused it.

4. I think the evidence brought in corroboration is not of that satisfactory and conclusive kind that I can entirely depend on it; more than this, it is a matter for grave suspicion, that not one of the letters sent as alleged, enclosing moneys, from the claimant to his father, or the father's alleged acknowledging receipt of such, was produced.

5. It is quite as extraordinary, if the insolvent paid his son, as it is alleged he did, early in 1879, \$33, and in the end of that year \$30 more, when the claimant went to Kingston to matriculate, that no entry should appear to show it in the insolvent's books. And it is quite as extraordinary that, in none of the leaves of the old diary produced, or in the pass book, do there appear to be credits given for the sums so received from the father, and the old diary, it is alleged, contains the foundation entries for those which appear in the other scrap of a book which I have called a pass book, and which presents quite as doubtful an appearance as the diary.

6. Again, I find entries in that old Diary under date of "Monday, April 7, 1876," "Lent," the letters "W. E. R." written over some other word or initials, which it is alleged were the letters "Pa." (for papa)—"\$24.00"—"Paid Mrs. McPherson for board up to date, \$6.00." "Received from the Trustee, \$30, in part payment of my Salary S. S. No. 19, Gainsborough;" and on the next page are written in pencil, under the date of March 10, the words, "Recd. from," and all the rest of the entries for two pages, which had been made in pencil, are rubbed out, apparently with India rubber. I must say I cannot rely upon such a book, or upon such evidence, in a contestation between a minor son, and this contestant, acting on behalf of his father's creditors. Were the case one set up by this same son against the executors or adminis-

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trators of his father after his death, it would, and ought to be, treated (were the evidence of the indebtedness like that presented in this case) with the gravest suspicion; any court would require the most conclusive proof of the correctness of the claim before it would be allowed, and I think the same must be done here as between him and the assignee of his father's estate.

7. A reference was made to McKenzie, the contestant, as capable of corroborating the father's statement—and it is said that he was in co-partnership with the insolvent in the grain business, and knew the insolvent was getting the money from his son, and that the insolvent got the \$300 in one sum from the claimant, which helped to pay off a note in the Bank; yet McKenzie was not called to prove that, but when he *was* called and examined on his own behalf, he did not corroborate that statement, except that he says, one morning about the time of the holidays of 1878, the insolvent came into the mill and said that his son had come home, and "*handed him some money*"—and thinks he mentioned the amount—probably it might have been \$300, and said he thought it was "*pretty well for a boy*;" that the insolvent said his son had "*handed him the money*;" that he knew nothing of any entry being made in any books about such a transaction; and that if the \$300, claimed as got from the claimant to pay off a note that the firm owed, was really received by the firm, it was entirely unknown to him; but there might have been notes paid off that he, the contestant, knew nothing of, whatever; that the insolvent did all the business, and the notes were given as partnership notes—they were the insolvent's notes, and the contestant endorsed them.

8. I think, on the whole evidence, I should not be justified in allowing this claim, as I am inclined to think the insolvent sent out his son (a minor), to earn money, and he took his earnings into his own possession, and that is what he meant when he told the Contestant that his son had "*handed*" him the money, and that it was "*pretty well for a boy*;" for if he had been borrowing money from his son at ten per cent. interest, there is no doubt, in my mind, that words conveying a different meaning would have been made use of than those which the contestant says were made use of on that occasion.

I therefore decide that the claimant is not entitled to be collocated on the dividend sheet of the estate for any part of his alleged claim, and I order him to pay the costs of this contestation.

REVIEW.

THE LAW AND PRACTICE AS TO PROBATE, ADMINISTRATION AND GUARDIANSHIP IN THE SURROGATE COURTS IN COMMON FORM AND CONTENTIOUS BUSINESS, INCLUDING ALL THE STATUTES, RULES AND ORDERS TO THE PRESENT TIME, WITH A COLLECTION OF FORMS. By ALFRED HOWELL, Barrister-at-Law. Toronto: Carswell & Co., 1880.

Since the abolition in 1858 of the Court of Probate for Upper Canada, to which there was an appeal from the various Surrogate Courts, there has been no central Court of Probate in this Province, all jurisdiction and authority, voluntary and contentious, in relation to matters and causes testamentary, and in relation to the granting or revoking of probate of wills and letters of administration being exercised in the several Surrogate Courts. The appellate jurisdiction which was then transferred to the Court of Chancery was afterwards, and is at present, vested in the Court of Appeal.

The Surrogate Courts' Act, 1858, by which the former Court of Probate for Upper Canada was abolished, and its powers and duties transferred to the Surrogate Courts (now thirty-eight in number), follows in part the English Court of Probate Act, 1857. By this Act the ecclesiastical jurisdiction (which had existed for eight centuries, and of which it was said by a writer in the *English Law Magazine*, 1857-8, "It was when the three Courts were not, when Chancery was unborn, and when an English jury was a feeble, heartless mob") in such matters was done away with, and the jurisdiction vested in Her Majesty, to be exercised by the Court of Probate.

As remarked in the preface of the present treatise—although many works have been written in England relating to the matters covered by the statute, there have been none specially adapted to the law and practice in the Province; and the business of the Surrogate Courts, except in ordinary common form matters, had, to some extent, become a "mysterious art"—as in England before the Probate Act, when the business

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there was confined to certain select practitioners of Doctors Commons. In fact, the Registrars have, during the twenty-two years which have elapsed since the Act was passed, become the repositories of knowledge in these matters; and have constantly been resorted to, not only for guidance in matters properly belonging to their official duties, but for advice upon difficult questions of Probate law. One object of Sir Richard Bethell's measure abolishing the ecclesiastical jurisdiction, and establishing the Court of Probate, is said to have been to simplify the procedure, and throw the practice open to the profession generally; and rules were made under that Act for carrying its provisions into effect both in contentious and non-contentious business. Although rules were made under our own Surrogate Courts' Act for carrying out its provisions as to common form business, the practice in contentious business, as well as in some matters of non-contentious business, was left by the statute to be governed by the practice of the English Court of Probate, as it stood in December, 1859, and through that by the practice of the former Prerogative Court, which had to be ascertained from various English works and from the English reports.

The setting forth of this practice, as applicable in our own courts, but hitherto unwritten and not provided for by Rules or Forms, is the principal feature of the treatise now under review.

In the presentation of his task, Mr. Howell seems to have spared no pains in collecting his materials, which he has succeeded in presenting to his readers in a form admirably arranged, and the work so far as we have been able to examine it, is reliable and of much practical value. He gives first a short introduction. Part I. contains the Surrogate Courts' Act, the Act respecting guardians of infants, with notes and references. Part II. relates to common form business, and gives the Rules, Orders and Forms. Part III. treats of the appointment of personal representatives, their compensation, probate of will, administration, limited grants, and grants generally, with matters of practice relating thereto. Part

IV. discusses contentious business, and the whole concludes with an appendix giving various rules, tables of costs, statutes, some useful, practical directions, forms, &c.

Mr. Howell's labours cannot but be of great service to his brethren as well as to officers in the courts, and we trust that he may reap some fruit from his labours in a field of literature which, so far, has not been of a very lucrative character.

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Transcripts to C. C.

To the Editor of THE LAW JOURNAL.

DEAR SIR,—In *Burgess v. Tully*, 24 C. P. 549, a serious defect in the law was pointed out by the Court, and several Sessions of the Provincial Legislature have been since held, but the defect is not remedied.

It was there held that a Division Court execution must be issued from the Division Court in which the judgment was obtained before a transcript could issue to the County Court under sec. 165. When the defendant lives in another division it is usually a farce to issue an execution in the division in which judgment was got, and it may happen that a defendant living in another division may have goods to satisfy the judgment, and yet be saddled with the costs of a transcript to the County Court, and executions against goods and lands and sheriff's fees.

Such a case has just come under my notice in which a defendant has had to pay not only the costs of transcript and executions, but costs of a chancery suit to get equitable execution against his lands.

This matter is surely not beneath the Legislature to remedy.

Yours truly,
BARRISTER.

October 22nd, 1880.

Leith's Blackstone.

To the Editor of THE LAW JOURNAL.

DEAR SIR,—As you are doubtless aware there has been a new edition of Leith's Blackstone published, differing very materially

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from the old edition which has been for a long time a prescribed text-book by our examiners, for instance in the old edition the "descent of real property at Common Law, under Stat. 4 Wm. IV. cap. 1, and under Stat. 14 & 15 Vict. cap. 6, occupied a very considerable space, whereas in the new edition it is not treated of in any way, and again the new edition devotes a large space to Constitutional Law, which is not to be found in the old edition at all. Now your correspondent would be obliged to know if it will be required of students going up for examination hereafter to be familiar with both editions. An answer through your valuable columns would be thankfully received.

Yours,
STUDENT.

Pembroke, Ont., 22nd Dec., 1880.

[We are told that after next Term the new edition will be put on the Curriculum.—Eds. L. J.]

Witness fees in Division Courts.

To the Editor of the LAW JOURNAL.

SIR,—It has been decided by a County Judge that not more than 75 cents per day can be allowed to professional witnesses in Division Court suits, because the Division Court Rule 147 gives no discretion to increase the fee except where the witness attends on a Superior Court subpoena. Some County Judges give professional fees in Division Court suits. What is the law or the general practice on this point?

Yours,
V.

[We believe the practice is as laid down in the first part of the above letter. One County Judge, of large experience, makes an exception in favour of Provincial Land Surveyors, who are entitled to professional fees, under the authority of the Land Surveyors' Act, R.S.O., cap. 146, sec. 25.—Ed. L. J.]

FLOTSAM AND JETSAM.

The following amusing account of the administration of justice-of-the-peace-law in the North-West we find in a volume written by Miss Fitzgibbon, just published by Rose-Belford Publishing Co., Toronto, entitled "A Trip to Manitoba:"

The winter of 1878 was mild and open, more so than had been known in the North-West for thirty years. The snow had vanished almost completely from the portages, and water covered the ice on many of the lakes. When, at Christmas, the staff accepted Mrs. C.'s invitation to spend the day at Iver, the question was whether they would come with dogs or canoes. Neither, however, were practicable, and they had to walk—some of them eighteen miles. We amused ourselves icing the cake, inventing devices, with the aid of scraps of telegraph wire, as supports for the upper decorations, decorating the house with cedar and balsam wreaths, and providing as good a dinner as it was possible to obtain in the woods. With the exception of having nothing for our guests to drink, we succeeded tolerably well. Being within the limits of prohibitory laws, it was necessary to ask the Lieutenant-Governor of Manitoba for an especial "permit" to have wine sent out; and we were answered that "if the men had to do without whisky, the gentlemen might do without wine." So we had to content ourselves with half-a-glass of sherry each, the remains of some smuggled out with our luggage in the spring.

We soon had proof that the men rebelled against the prohibitory law. The presence of whisky being suspected in a neighbouring camp, a constable who had been but recently appointed, and was anxious to show his zeal, never rested until he had discovered the smuggler and brought him to justice; the clause that the informer was entitled to half the fine of fifty dollars not diminishing his ardour.

To a lawyer the proceedings would have been amusing, for all parties concerned were novices in their respective rôles. The justice of the peace, with a great idea of his own importance, the majesty of the law, and the necessity for carrying it out to the letter, had obtained several manuals for the guidance of county justices of the peace and stipendiary magistrates, over the technicalities of which he spent many a sleepless hour. No sooner had he mastered the drift of one act, than the next repealed so many of its clauses that the poor man became helplessly bewildered. Handcuffs there were none, neither was there a lock-up, and the constable spent his time in keeping guard over the prisoner, being paid two dollars a day for the service. The latter was fed and housed,

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and, not having been overburdened with work or wages for some time, did not object to the incarceration.

Ultimately he was tried, found guilty, and fined fifty dollars or a month in jail. Many arguments arose between magistrate and constable, as the latter, having served in the United States, and there learned a smattering of Yankee law, was resolved to make his voice heard in the case. "The inability of the prisoner to pay the fine of course made it necessary to fall back upon the alternative—thirty days in jail, which was a hundred and odd miles off. There was no conveyance to take him thither, and no roads even if there had been; and the man refused to walk.

"If I had the money I'd pay the fifty and have done with it," he said; "but, not having it, I can't do it. If I am to go to gaol, all right, take me; but whoever heard of a man walking there of his own accord?" And he whittled away at the stick in his hand, feeling that he was master of the situation. Being remanded until the next day, to keep up some semblance of proper procedure, he went away quite contentedly, only to return the next day and the next to repeat the same farce. At last both magistrate and constable began to look rather tired, while the prisoner, on the contrary, was quite at his ease. The wire was down between us and Winnipeg, and no advice could be obtained. So at last the constable, agreeing to forfeit his share of the fine, and the magistrate to take a time-bill on the contractor for the next section of the railway for the remaining twenty-five dollars, they let the man go.

Law is very like a sieve; it is easy to see through it, but one must be considerably reduced before he gets through. Exchange.

A NEWLY appointed Irish court crier being ordered to clear the court-room, yelled out: "Now thin, all ye blackguards that isn't lawyers must lave the court."

In a case in Connecticut, last month, the judge ruled that certain evidence was inadmissible. The attorney took strong exceptions to the ruling, and insisted that the offered evidence was admissible. "I know, your honour," said he warmly, "that it is proper evidence. Here I have been practising at the bar for forty years, and now I want to know if I am a fool?" "That," quietly replied the court, "is a question of fact, and not of law, and so, I won't pass upon it, but will let the jury decide."

A prisoner was arraigned for some offence against the criminal laws of the State, who stated he was unable to have a lawyer. The court told

him to select one of a number of young lawyers present to represent him. He contemptuously surveyed the group of legal tyros, and remarked that he preferred to plead guilty at once than be embarrassed with such counsel. This provoked a ripple of laughter from the bystanders, at the expense of the ignored lawyers. The court gave the prisoner the full term. Thereupon, the lawyers laughed, and "honours were easy."

In Lynnhurst, Va., a distinguished member of the bar, appealing to the court for the discharge of his client, wound up with the statement that if the court sent him on further trial, a stain would be left on his character which could not be washed off by all the waters of the blue ocean and all the soap which could be manufactured from the "ponderous carcass of the Commonwealth's attorney." To this the ponderous attorney replied, that while he "deemed it foreign to the case at bar, he desired to advise the court, if they thought it advisable to boil his body into soap, they should look to the opposite counsel for the concentrated lye out of which to make it."

A NAUTICAL DIVORCE.—A correspondent writes from Yokohama: "One of those curiosities of procedure which crop up at times in the most unheard of way, came under my notice recently and may interest you. It is that of a husband and wife on board the *Bullion*, one of our American ships in the course of her voyage from New York to Japan, pronounced by her worthy captain, arrayed for the time with the authority of the chancellor. The record of the proceeding, as entered by the captain upon the 'log' of the ship, is as follows: 'Feb. 6, at 3 p.m.; lat. 40° 30' S., long. 156° 32' E., Charles Brown, cook, and Harriet Brown, stewardess, separated as man and wife, with their own free will and accord, dividing their clothes and signed clear of each other forever as man and wife, each taking separate rooms.'

When the lamented Judge Manniere was on the circuit bench, a German from one of the interior towns of the county who had just been elected as justice of the peace, but had never tried a case, came into his court to witness a trial, so that he might know to proceed when he should be called upon to administer justice. It so happened that he was present during the last day of the celebrated Hopp's murder trial, and heard Judge Manniere sentencing Hopp to be hung. About ten days after this his first case came on for trial. It was upon a note of hand, and amounted to \$12.25. Addressing himself to the defendant Hans, he said, "Stand up! What has the prisoner to say why the sentence of the court should

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not be pronounced upon him?" The poor defendant, frightened by the solemn manner of the justice, said he had nothing to say. "Then," said the justice, "it is the sentence of the court that you pay to the plaintiff, John Dedrich, the sum of \$12.25 and \$3.50 costs, and may God Almighty have mercy on your soul."

A NOW-PLUSSÉD JUDGE.—An Irishman sold his farm and bought another in the same neighbourhood, and, in moving, he took the manure from his old farm to enrich his new one, and the purchaser sued him for so doing.

Upon the trial, the judge instructed the jury that, according to the law, "manure is a part of the real estate," and that they must, therefore, give a verdict in favour of the plaintiff for the value of the manure.

This so exasperated Pat, that he jumped up and addressed the court in an excited manner, as follows: "Do you say, judge, that manure is a part of the real estate?"

"Certainly," replied the judge, "as much as the soil."

"Now, judge, is not a cow personal property?"

"Yes," said the judge.

"And is not hay personal property?" "Yes."

"Well, now, thin, judge, will you please explain to the jury how one piece of personal property can go through another piece of personal property and come out real estate?"

J. YORK SAWYER was one of the early circuit judges of Illinois. He weighed about two hundred and fifty pounds, had a squint eye, was from one of the Eastern States, and prided himself upon his learning and dignity. When Springfield was a small village, he was holding court there in a log house, and had for his jail a log stable. In passing sentence upon a man for horse stealing, he said, "If such things are allowed, we could keep no horses in our stables, no cattle in our yards, no hogs in our pens, no chickens on our roosts," etc., etc.

A tall, lean, lank rail-splitter, who was standing in the crowd of sturdy pioneers, who had gathered in the log court-house to hear the sentence of the court pronounced upon the horse thief cried out at the top of his voice: "Hit him again, old gimlet-eye, he's got no friends here, we'll stand by you."

The judge feeling that his dignity had been offended, exclaimed: "Who said that? who said that?"

The rail-splitter, raising himself head and shoulders above the crowd, said: "This old hoss said it, sire."

Judge Sawyer said: "Mr. Sheriff, take that old hoss, and put him in the stable."

The sheriff obeyed the judge's order, and the poor rail-splitter had to remain in the log jail over night, because he dared, in a rough and honest way, break in and applaud the action of the judge in a matter in which the settlers were very much interested.

This question of the cost of litigation arises collaterally on the consideration of the claim of Mr. Dentre, Q. C., upon the Dominion Government, for services as counsel before the Fisheries Commission, which services he values at \$50 a day, the aggregate being some \$90,000, we believe. The *Canada Loyal News* informs us that "Mr. Dentre depused that in the test case of *Angers v. Queen Ins. Co.* he received \$500 in fees, although he spent but two days in court. In another case, in which he obtained a \$12,000 verdict he was three days in court, and received \$1,800 in fees besides the taxed costs. In the case of *Grant v. Besudry*, known as the Orange trial, he was paid \$10 per hour. Mr. F. X. Archambault, of Montreal stated, that in the case of *Wilson v. Citizens' Ins. Co.* the amount claimed in the suit was \$2,000, but he received \$1,000 as a retainer, besides other fees. In the case of *Bolland v. Citizens Ins. Co.*, his retainer was \$2,000. In three *casus* cases which were presented as one, and which lasted about a month, he received \$2,800 altogether. In the criminal case of a woman charged with stealing silks, he received a retainer of \$1,500. This client was merely admitted to bail. To defend a criminal case, which would not occupy more than two days, he had received \$2,000." These amounts seem large, no doubt, but they are by no means unprecedented in this country. There are a number of counsel in the city of New York who command \$250 dollars a day. There would seem to be no reason why a British lawyer should not be paid as much as a British physician, both standing equal in their respective professions; and a British jury recently gave Dr. Phillips a verdict of \$16,000 damages for two years' loss of business.—*Albany Law Journal*.

SHYSTERS AND PETTIPOGGERS.

Chief Justice Ryan, of Wisconsin, in his address to the graduating class of the University of Wisconsin, June 22, 1880, thus speaks:—

"Behold the pettifogger, the blackleg of the law! He is, as his name imports, a stirrer-up of small litigation; a wet-nurse of trifling grievances and quarrels. He sometimes emerges from professional obscurity, and is charged with business which is disreputable only through his own tortuous devices. For the vermin can't forego his instincts, even among his betters. He is generally

FLOTHAM AND JETRAM.

found, however, and he always begins, in the lowest professional grade. Indeed, he is the troglodyte of the law. He has great cunning. He mistakes it for intelligence. He is a fellow of infinite pretence. He pushes himself everywhere, and is self-important wherever he goes; you will often find him in legislative bodies, in political conventions, in boards of supervisors, in common councils. He is sometimes there for specific villainy; sometimes on general principles of corruption, waiting on Providence for any fraudulent job. He is always there for evil. The temper of his mind, the habits of his life, make him essentially mischievous. In all places he is always dishonest. When he cannot cheat for gain, he cheats for love. He haunts low places, and haunts with the ignorant. It is his kindly office to get them by the ears, and to feed his vanity and his pocket from the quarrels he incites and foment. He is in everybody's way, and pries into everybody's business. He meddles in all things, and is indefatigable in mischief. He is just lawyer enough to be mischievous. He is a living example of Pope's truth, 'that a little learning is a dangerous thing.' Among his ignorant companions he is infallible in all things. Sometimes he is reserved and sly, with knowing look, which gains credit for wisdom and character, for thinking all he does not utter. Generally he is loquacious, demonstrative of his small eloquence. Then his tongue is too big for his mouth, and his mouth too loose for truth. By his own account, he is full of law and overflowing. Among his credulous dupes he cannot keep it down. He knows all things; nothing is new to him; nothing surprises him; nothing puzzles him. But it is in the law that his omniscience shows best. His talk is of law incessantly. He has a chronic flux of law among his followers. He prates law mercilessly to every one except lawyers. He discourses of his practice and his success to the janitor of his office and the chow-woman who washes his windows. He revels in demonstrative absurdity, and boasts of all he never did. He is the guide, philosopher and friend of vicious ignorance. He is the oracle of dulness.

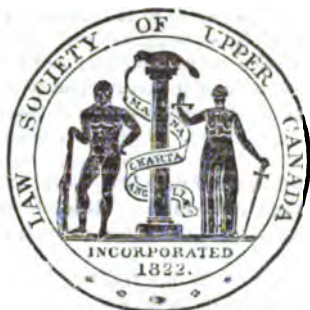
"And still the wonder grows,
That one small head can carry all he knows."

"He hangs much around justices' courts. There he is the leaver of the bar. But he finds his way into courts of record. In them he is a plague to

the bar and an offence to the bench. He is flippant, plausible, captious, insolent. He is full of sharp practices, chicanes, surprises, and trick. He is the privateer of the court; plundering on all hands on private account. He is ready to sell his client or himself. He is equal to all things, above nothing and below nothing. He is ready to be the coroner of the county or the Chief-Justice of the United States. He would be a bore if he were not too dangerous for that harmless function. He is a nuisance to the bar, and an evil to society. He is a fraud upon the profession and the public—a lawyer among clowns and a clown among lawyers.

"There is a variety of these animals, known by the classic name of Shyster. He has forced the word into at least one dictionary, and I may use it without offence. This is still a lower specimen: the pettifogger pettifogged upon; a troglodyte who penetrates depths of still deeper darkness. He has all the common vices of the family, and some special vices of his own. This creature frequents common courts and there delights in criminal practice. He is the familiar of bailiffs and jailors, and has a sort of undefined partnership with them in thieves and ruffians and prostitutes. These he defends or betrays, according to the exigencies of his relations with their captors or prosecutors. He has confidential relations with those who dwell in the debatable land between industry and crime. He is the friend of pimps and fences. He has intimacies among the vicious men and women. He is the standing counsel of dens and houses of ill-fame. He knows all about the criminals in custody, and has extensive acquaintance among them at large. He is conversant with their habits of life, and calls them familiarly by their Christian names. He prowls around the purlieus of jails and penitentiaries, seeking clients, inventing defences, organizing perjury, tampering with turnkeys, and tolling prisoners. He levies blackmail on all hands. His effrontery is beyond all shame. He thinks all lawyers are as he, but not so smart. He believes in the integrity of no man; in the virtue of no woman. He loves vice better than virtue. He enjoys darkness better than light. His habits of life lead him by the dark lanes and dark ways of the world. He is the confidant of guilt. He is the Attorney-General of crime."

LAW SOCIETY, TRINITY TERM.



Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 44TH VICTORIAE.

During this Term, the following gentlemen were called to the Degree of Barrister-at-law.

FREDERICK WRIGHT.
EDWARD MORGAN.
WILLIAM HENRY BEATTY.
JOHN CANAVAN.
EDWARD MAHON.
ALEXANDER HENRY LEITH.
JOHN JOSEPH BLAKE.
CHARLES EDWARD HEWSON.
WILLIAM HODGINS BIGGAR.
WILLIAM HENRY POPE CLEMENT.
SKEFFINGTON CONNOR ELLIOTT.
PATRICK MCPHILLIPS.
WILLIAM BRUCE ELLISON.
JOHN STANLEY HOUGH.
MICHAEL ANDREW McHUGH.
WILLIAM GEORGE EAKINS.
JAMES ROLAND BROWN.
RICHARD WORNALL WILSON.
JAMES EDWARD LEES.
JOSHUA ADAMS.
ROBERT SINCLAIR GURD.

(The names are placed in the order in which the Candidates entered the Society, and not in the order of merit.)

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates.

EDWARD LOOKYER CURRY.
WILLIAM ARMSTRONG STRATTON.
GEORGE SMITH.
ALEXANDER SUTHERLAND.
JOSEPH BURR TYRRELL.
WILLIAM JOYNT JAMES.
THOMAS HENRY GILMOUR.
THOMAS VINCENT BADGELEY.
HARRY LAWRENCE INGLES.
JAMES BURDETT.
GEORGE ROBSON COLDWELL.

HARCOURT JOHN BULL.
ISAAC NORTON MARSHALL.
WELLINGTON JEFFERS PECK.
ALVIS JOSHUA MOORE.
WILLIAM ARTHUR DOWLER.

Matriculants.

GEORGE HAMILTON JARVIS.
EDMUND JAMES BRISTOL.
W. K. McDougall.
ALFRED HENRY COLEMAN.
ARCHIBALD MCKELLAR.
STEPHEN O'BRIEN.
HARRY EARL BURDETT.
JOHN ANDREW FORIN.

Junior Class.

HOBACE FALCONER TELL.
RICHARD J. DOWDALL.
DANIEL S. KENDALL.
GEORGE FREDERICK BELL.
ANGUS CLAUDE McDONELL.
OLIPH LEIGH SPENCER.
SANDFORD DENNIS BIGGAR.
HARRY ANSON FAIRCHILD.
GEORGE CRAIG.
JAMES ARMSTRONG.
ARCHIBALD MCFADYEN.
WILLIAM ALFRED JOSEPH GORDON Mc-
DONALD.
* CHARLES MAIN BYGRAVE LAWRENCE.
COOTE NESBITT SHANLEY.
A. C. STEELE.
GUERRET WALL.

And the following gentlemen passed the Preliminary Examinations for Articled Clerks:—

DAVID DUNCAN.
PETER YOUNG.
MATTHEW WILKINS.

By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks'

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DIARY FOR DECEMBER.

2. Thur. . . Re-hearing Term in Chancery begins.
4. Sat. . . Michaelmas Term ends. Armour, J., sworn in, Q. B., 1877.
5. Sun. . . Second Sunday in Advent.
7. Tues. . . County Court sittings for York begin.
11. Sat. . . Blake, V. C., sworn in, 1872.
12. Sun. . . Third Sunday in Advent.
14. Tues. . . County Court sittings (ex-York) begin.
15. Wed. . . Christmas vac. in Supreme Court and Exch. Ct. begins. Morrison, J., sworn in, Court of Appeal, 1877.
17. Fri. . . First Lower Canada Parliament met, 1792.
19. Sun. . . Fourth Sunday in Advent.
24. Fri. . . Courts of Appeal and Chancery begin.
25. Sat. . . Christmas Day.
26. Sun. . . First Sunday after Christmas. Upper Canada made a Province, 1791.
27. Mon. . . Spragge, V. C., appointed Chancellor, 1879. Municipal nominations.
31. Fri. . . Rev. Stat. of Ont. came into force, 1877.

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Canada Law Journal.

Toronto, December, 1880.

Sir A. J. E. Cockburn, Chief Justice of England, is dead. His successor is Lord Coleridge, Chief Justice of the Common Pleas.

The following appointments appear in the *Canada Gazette* of the 27th ult:—

Hon. John F. McCreight, Q.C. and Hon. Alexander Rocke Robertson, Q. C., of Victoria, to be Puisne Judges of the Supreme Court of British Columbia.

When speaking in our last issue of the recent appointments of Queen's Counsel the name of Mr. Richard Martin, of Hamilton, was inadvertently omitted as one of those who was on the Ontario list of April, 1876, and whom we should have expected to have seen in the late list in the *Canada Gazette*. It is really, however, a matter of little consequence inasmuch as (to use the language of Lord Chelmsford when speaking of the multitude of silk gowns nowadays) "the distinction has now become *all stuff*."

We welcome the appearance and distribution (*gratis*) of the very complete and well-arranged Catalogue of Osgoode Hall Library, compiled and edited by Mr. G. M. Adam. A most important part of this volume is the arrangement and classification of the American reports, which one needs to have at one's fingers' ends to find the books as now shelved in the galleries of the Library. Another excellent point in the new catalogue is the index of subject which seems very exhaustive.

We understand that the feeling of hostility to the existence of the Supreme Court is in the Province of Quebec very marked. To say the least of it such judgments as that in *McKay v. Chrysler* do not tend to establish confidence in the Court in this Province. In that case the Court of Chancery, and Court of Appeal, and the two Ontario Judges in the Supreme Court agreed in sustaining a title on questions arising under Ontario Statutes. This formidable array was overruled by Chief Justice Ritchie, and Justices Fournier and Henry. How is

EDITORIAL NOTES.

it possible to get an Ontario Bar or the Ontario public or in fact any unprejudiced mind to say that the probabilities are not largely in favour of the view of the nine eminent judges, who have been overruled, on points in which they are specially versed, by three judges of less experience and certainly of no greater ability or research.

The completion of the labours of the New Testament Revision Committee is a matter of national importance and of deep significance to all English-speaking people. There is little doubt that this revision will be accepted and adopted by the public, and if so, it will be the ninth English version which has successively come into general use. It is expected that the University presses of Oxford and Cambridge will issue the revised New Testament in February, 1881. We see it stated in our exchanges that immediately on the appearance of the new version, an eminent firm of London publishers will also issue an edition and contest at law the legal right of the Company of Revisors to the copyright. In our opinion, if it be necessary the right to this copyright should be protected by Parliament, as there is a great outlay of large necessary expenses incurred by the English and American Boards of Revision to be provided for.

The irrepressible Sheriff at Hamilton is out with another pamphlet on the subject of Sheriff's fees, &c. As far as we can judge, from what he states therein, he is so utterly disliked by the profession in his own county that they take every means to "starve him out." There are a few other sheriffs almost as obnoxious, but we are glad to say very few. Those of his cloth who have any regard for their own interests should endeavour to suppress this pamphleteer, for there is no

knowing how he may injure them before he is stopped. We presume the Attorney-General will see to it that the public are protected from his scheme to put money in his own pocket at their expense. Curiously as it may sound to some, the interests of litigants and lawyers are the same in this matter. As the present pamphlet is much the same as the last, the statements therein need not again be refuted.

It has been supposed that the Bar of the United States is peculiar in the laxity of its discipline; but if the following extract from an exchange gives any indication, there is one country we know of, that, so far as the breach of professional ethics is concerned (not now making any comparison as to the ethics alone) has no ground for boasting of being in an advanced condition. We might here, *en passant*, ask what has been done by the Law Society in connection with the treatment of Mr. Hutchinson by a brother member of the London Bar. The extract referred to is as follows:—

"The Supreme Court of Baltimore, Md., after a protracted trial entered an order on the 9th inst. striking from the roll of attorneys of that Court the name of ex-Judge Wm. E. Gleeson. The order of the Court in the case professes to set out the offence charged, and is as follows:—

'Testimony having been argued fully on both sides by counsel, it is therefore, on this 9th day of November, 1880, found and adjudged by the Supreme Bench of Baltimore City, that the respondent the said Wm. E. Gleeson, on or about the 4th day of June, 1880, in the case of W. A. Reed & Co. against C. J. Proctor, and which was then being tried in the Baltimore City Court before the judge presiding therein, in answer to an inquiry from the judge why a certain witness was not produced, replied that we (meaning himself, the said Gleeson, and his client, S. T. Proctor), have had the witness, meaning a certain John S. Edwards, summoned but he failed to attend, or words of like import and effect, and that said reply was false, the said witness, as said Gleeson well knew, having on said day attended said Court after having been summoned aforesaid, and having been dismissed by said Gleeson, and that

LIABILITIES OF ASSURANCE COMPANY.

said reply was made by said Gleeson with the intent to deceive and mislead the said judge, and tended to deceive and mislead him, and it is therefore further adjudged, ordered, and decreed that the name of the said Wm. E. Gleeson be stricken from the roll of attorneys of this Court, and that he be disbarred from practising therein, or in any of the Courts of Baltimore City in which the judge of this Court presides.'

The offence of the respondent seems to be that he deceived the judge in the course of the trial of a cause. It does not appear that the alleged deception was important or that it worked any injury to any one. The gravamen of the offence seems to be merely that of the untruthfulness of the lawyer on a certain occasion referred to. If this, without regard to results or attending circumstances, is an offence for which the name of an attorney may be stricken from the roll, Judge Gleeson may not have been the first guilty party in this regard among the legal fraternity. If this is to be adopted as the settled rule, it should be extended to the discipline among lawyers in their professional intercourse with each other. An untruthful statement to a judge on the bench would not appear in itself to be any greater offence than an untruthful statement to a brother lawyer in professional intercourse; and if the tendency of the decision quoted shall be towards including the latter class of cases, the bar will hail the decision as a step in the proper direction."

LIABILITIES OF ASSURANCE COMPANY WHEN LIFE POLICY IS ASSIGNED.

Cases have lately been decided of great importance to insurance Companies (especially those insuring life) as to their rights and liabilities when the policy has been assigned for the benefit of a creditor. It has been a matter of some doubt and perplexity as to what attitude the company should take when a person whose life has been assured with them dies in a state of insolvency, and it appears that he has, before his decease, assigned the policy to secure a debt for a sum perhaps larger than the amount assured. In such a case is the Company justified in withholding payment until a proper personal representation of the deceased has been appointed, or is the Company safe in

paying to the assignee of the policy? If in such or similar circumstances payment is withheld, is the Company liable to pay interest on the amount of the policy? It has been urged that when the policy has been assigned by the assured the assignee has the right to enforce payment and give a valid discharge to the Company. No doubt in such a case the Company could safely pay, and would be protected in the payment by the Court of Chancery,—but as a matter of strict law it is urged on the other side that the Company are entitled to require a discharge from the personal representatives of the deceased,—inasmuch as the cause of action and the right to receive the amount do not arise till the death of the assignor (the assured), and the vesting of that right of action in his personal representative cannot in law be anticipated by a previous assignment to a stranger. In *Crossley v. Glasgow Life Assurance Company* L. R. 4, Ch. D 421, it appeared that the deceased had promised to assign or deposit his policy to secure a debt due to the plaintiff, and had sent the policy to the plaintiff with the view of having the necessary documents prepared. But no writings were executed although the policy was retained by the plaintiff to secure a debt which exceeded the sum assured. No personal representative of the deceased had been appointed. The Master of the Rolls held that the Company was justified in refusing to pay without getting a proper receipt, and that they were not bound to accept an indemnity on paying the plaintiff. There was not even an equitable assignment of the policy, and the Company had the right to have it proved that there was a debt due by the deceased to the plaintiff equal to the amount of the policy. The way in which the Judge disposed of the case, however, was rather singular. He found on the

LIABILITY OF ASSURANCE COMPANIES--THE DOMINION AND THE EMPIRE.

facts that the plaintiff was entitled to the money, and for this reason dispensed with the presence of the personal representative, but he ordered the Company to pay interest on the policy-money, not following the views expressed in *Wolfe v. Findlay*, 6 Ha. and relying on the Statute 3 & 4 Wm. IV. c. 42, s. 28, as making a difference. This provision is the same as our C. S. U. C. c. 43, s. 3. (now R. S. c. 50, s. 268, p. 667.) Respecting this statute, the construction placed upon it by Mowat, V. C., in *Box v. Provincial Insurance Company*, 19 Gr. 48 is that while it has been customary with the Courts to give interest on money recovered against Insurance Companies, yet it is a matter of discretion only with the Court, as with the jury, and not a strict legal right. And we would have thought that when there was no hand to receive or grant a legal discharge, as in the Crossley case, it was not a case for interest.

Very much the same question was again brought before the same Judge in *Webster v. The British Empire Mutual Life Assurance Company*. The facts were that, the deceased had deposited the policy with the plaintiff, to secure a sum less than the amount assured. No written assignment was executed and no letters of administration had been taken out,—the assured having died intestate and insolvent. The Master of the Rolls followed his previous decision, holding that the defendant could not safely have paid the money to the plaintiff in the absence of a personal representative without the protection and indemnity of an order of the Court; but he held that the Company must pay interest from the date of the proofs of the death. Upon appeal this part of the decree was reversed by the unanimous judgments of James, Cotton and Thesiger, L. J., 28 W. R. 818.

They held in effect that interest would only be given by way of damages for the wrongful detention of the money, and the Company was not in default. The opinion of Lord Justice James supports the view that to put the Company clearly in the wrong the assignee should have clothed himself with the character of personal representative. He says "he was not bound to incur the expense of taking out letters of administration, or making himself liable to the responsibility of an administrator; he was not compelled to do that, and therefore he did not clothe himself with a legal title. But the guilt of default (if it is to be called so), was on his side because that was not done which it was perfectly clear was open to the person in whose right the plaintiff is suing, namely, at any time to have clothed himself with the legal representation which was required to complete his title." This is manifestly right where the assignment was only of a part of the sum and no written assignment of the policy was executed. But it would be doubtful whether the assignee should be compelled to do this where the policy was wholly assigned to him by a proper instrument empowering him to receive the money and grant receipts therefor. See *Fenner v. Mears*, 2 W. Bl. 1269.

Evidence was given in this case that the Company had kept the money ready to meet the demand, but L. J. Thesiger was of opinion that even if it had appeared that the Company had used the money, they should not be mulct in interest, as there had been no default by them.

THE DOMINION AND THE EMPIRE.

THE DOMINION AND THE EMPIRE.*(Concluded.)*

I look, I say, on the Imperial rights of Great Britain, and the privileges which the colonists ought to enjoy under these rights, as being just the most reconcilable things in the world.

EDMUND BURKE.

But as for the colonies, we purpose, through Heaven's blessing, to retain them awhile yet! Shame on us for unworthy sons of brave fathers if we do not.

THOMAS CARLYLE.

A passage quoted in the last article on the above subject showed that Mr. Todd fully recognizes—as, indeed, he does again and again—that the Crown must always act through advisers, approved of Parliament. And as Mr. Sheldon Amos says, in his recent work on the English Constitution from 1830 to 1880, “When once the principle of the responsibility of the Ministers of the Crown to Parliament has been firmly established, there is scarcely any opening left for the irresponsible action of the Sovereign in entire independence of the help or agency of persons who may be made accountable to Parliament.” What opening there is seems to lie in the direction of what Mr. Amos calls, in another part of the same book, “cautious, self-restrained, and purely tentative suggestiveness,” and in another place, “influence of the mere formal consultative sort.” Nor, indeed, does Mr. Todd appear to claim much more than this, although there are certain passages in his first chapter on “the Sovereign, in relation to parliamentary government,” which may seem to assert for the Sovereign a right to exercise that “subtle, undefined, and therefore unlimited influence, constantly playing on the deliberate counsels of those who are bound to give an intelligible explanation of every step taken to Parliament and the country,” which Mr. Sheldon Amos declares would be a factor

for which no theory of the English Constitution in its present form can possibly find a place. Mr. Todd, however, quotes with approbation (p. 21) words of Mr. Gladstone, to the effect that the constitutional influence of the Sovereign is a moral, not a coercive influence, and operates through the will and reason of the Ministry, not over or against them.

We have, however, to do mainly with the functions of the governor of a British colony, which, owing to his dual position before alluded to, must needs be practically greater than those of the Sovereign in the Mother Country. (See Todd, p. 458.) In briefly considering these, it will be impossible to separate the subject from that of the relation of the imperial Government to the colonies generally. It is proposed, therefore, to touch briefly on some of the more important points in this connection alluded to in Mr. Todd's work.

Sir Alexander Bannerman, writing as Governor of Newfoundland in 1861, declares that the new system of responsible government, which was conceded in 1855, instead of lessening, increases a governor's responsibility (Todd, p. 449). It would appear, however, that with reference to the local concerns of a colony, the governor can directly do no more than exercise the same sort of influence that the Sovereign may constitutionally exercise in England. The position of a governor in this respect seems admirably expressed by Sir G. Bowen in a despatch written when Governor of Queensland in 1860 (Todd, p. 66-67):

“There cannot, in my opinion, be a greater mistake than the view which some public writers in England appear to hold; namely, that the governor of a colony, under the system of responsible government, should be, in a certain sense, a *roi fainéant*. So far as my observation extends, nothing can be more opposed than this theory to the wishes of the Anglo-Australians themselves. The governor of each of the colonies in this group is expected not only to act as the head of society;

THE DOMINION AND THE EMPIRE.

to encourage literature, science, and art; to keep alive, by personal visits to every district under his jurisdiction, the feelings of loyalty to the Queen, and of attachment to the Mother Country, and so to cherish what may be termed the imperial sentiment; but he is also expected, as head of the Administration, to maintain, with the assistance of his council, a vigilant control and supervision over every department of the public service. In short, he is in a position in which he can exercise an influence over the whole course of affairs, exactly proportionate to the strength of his character, the activity of his mind and body, the capacity of his understanding, and the extent of his knowledge."

The governor is bound to maintain a strict neutrality between contending parties in politics, and a strict impartiality on all party questions, in which neither the prerogative of the Crown nor other imperial interests are involved. Mr. Todd illustrates this by the case of Sir C. Darling, whose infringement of this obligation, when governor of Victoria, in 1865, led to his recall by the imperial Government (Todd, p. 103, and see p. 490). Again, he is forbidden to implicate himself in disputes between the two Houses of the Legislature, such as that still in progress in Victoria. "It is clearly undesirable," writes Lord Canterbury, in 1867, "that he should intervene in such a manner as would withdraw these differences from their proper sphere, and so give them a character which does not naturally belong to them, of a conflict between the majority of one or another of the two Houses and the representative of the Crown" (Todd, p. 491).

There are, however, as Mr. Todd points out, (p. 432), two limitations to this rule of non-interference on the part of a constitutional governor in matters of local concern, viz. : (1) the governor must never sanction any ministerial act or principle which infringes upon an existing law : see Lord Granville's despatch to the Governor of Nova Scotia, dated January 7th, 1870, (Todd, 439). (2)

The governor is bound not to ratify an act or proceeding of his ministers before satisfied of its wisdom and expediency. As to this Mr. Todd explains his meaning to be that if the governor disagrees with his ministers "upon any matter affecting the public interests which he may consider of sufficiently vital consequence to justify such an extreme measure, he is always entitled, as a last resort, to dismiss them from his counsels, and to have recourse to other advisers." Should the country refuse to support the action of the governor, he must, as we are told (p. 41) : "either recede from the position he has taken in the first instance or retire from office."

The administration of Sir C. Darling in Victoria affords Mr. Todd many illustrations of various parts of his subject, and amongst others of the duty of the governor of a colony to refuse to sanction any unlawful proceedings. In 1865 the Assembly of Victoria endeavoured to impose a new tariff by tacking it to the annual appropriation bill, and the Legislative Council threw the whole bill out; Sir C. Darling yielded to his ministers so far as to sanction the levy of new duties on the mere resolution of the Assembly. For this he was severely reprimanded by Mr. Cartiwell who in a despatch, quoted by Mr. Todd (p. 104-5), says :—

"The Queen's representatives is justified in deferring very largely to his constitutional advisers in matters of policy, and even of equity; but he is imperatively bound to withhold the Queen's authority from all or any of those manifestly unlawful proceedings by which one political party or one member of the body politic is occasionally tempted to endeavour to establish its preponderance over another."

Thus, then, the conduct of a governor, though pursued in deference to the advice of his ministers, is open to censure on the part of the imperial Government, whose representative he is.

THE DOMINION AND THE EMPIRE.

The prerogatives of dismissing his ministers, and of dissolving Parliament (provided other ministers can be found to shoulder the responsibility), are among the most important constitutional powers of the Sovereign or her representative, and afford some of the most striking examples of beneficial action on the part of governors in British colonies. A good example of the beneficial exercise of this prerogative, though in direct opposition to his ministry, who at the time commanded a majority in the local house, is furnished by the action of Mr. Manners Sutton (afterwards Lord Canterbury), when Governor of New Brunswick in 1855. Deeming the repeal of certain legislation prohibitory of the liquor traffic—which it had proved impossible to enforce—expedient to the best interests of the community, he insisted on dissolving Parliament; and by the newly elected house his action was supported by a vote of thirty-two to two, and both houses expressed their satisfaction at the governor's judicious exercise of his constitutional powers, and at the promptitude with which he had had recourse to the advice of Parliament.

Mr Todd, indeed, gives most interesting precedents of the exercise of this discretion, in opposition in some cases to the advice of ministers, and in others to the votes of legislative bodies,—in the old Province of Canada, in Nova Scotia, South Australia, Victoria, New Zealand, and Tasmania. The last example he gives occurred last year in Quebec, on the defeat in the Legislative Assembly of the Joly administration. Mr. Todd gives at full length what he calls the "excellent memorandum" of M. Robitaille on that occasion.

And as the power of the governor of a Colony in respect to the local concerns of the colony is subject to the same constitutional restrictions as that of the So-

vereign in the mother-country, so also the imperial Parliament, in the case of self-governing colonies has conceded the largest possible measure of local independence, and practically exerts its supreme authority only in cases of necessity or where imperial interests are at stake: (Todd p. 462.) As Sir M. Hicks Beach says in a despatch written in 1877, quoted by Mr. Todd p. 497,—“Her Majesty's Government have no wish to interfere in any questions of purely local colonial policy; and only desire that the colony should be governed in conformity with principles of responsible and constitutional government, subject only to the paramount authority of the law.”

But even in matters of internal administration Mr Todd remarks (p. 161), that the interposition of the Crown through a Secretary of state may be constitutionally invoked and properly exercised, (1) in questions of an imperial nature: (2) in the interpretation of imperial statutes which have consigned to the imperial authorities certain specified duties on behalf of the colony: (3) where the local authorities voluntarily appeal to Her Majesty's secretary of state for his opinion or decision. A good example of the second class of cases is afforded by the application of Mr. Mackenzie in 1873 to Her Majesty to add six members to the Canadian Senate under sec. 26. of the B. N. A. act. Lord Kimberley, then Secretary of state, declined to interfere, saying:

“Her Majesty could not be advised to take the responsibility of interfering with the constitution of the Senate except upon an occasion when it had been made apparent that a difference had arisen between the two houses of so serious and permanent a character that the government could not be carried on without her intervention, and when it could be shewn that the limited creation of Senators allowed by the act would apply an adequate remedy.”

Thus, in Mr. Todd's view, (p. 164), a

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move which was undeniably intended to give the existing administration a majority in the Senate was frustrated.

Of the third class a good example is the arbitration by Lord Kimberley between British Columbia and the Dominion in 1874,—when, as Mr. Todd says (ib.): “His terms were frankly accepted by the parties concerned, and contributed for a time to restore a good understanding between the Dominion and Provincial government.”

So, too, as to legislation, although the constitutional supremacy of the imperial parliament as formally reasserted by Imp. 28 & 29 Vic. c.63,—is indisputable. Yet, as stated as far back as 1839, in a despatch of Lord Glenelg to Sir Francis Head, then Lieut. Governor of Upper Canada, “parliamentary legislation on any subject of exclusively internal concern, in any British Colony possessing a representative assembly, is as a general rule unconstitutional.”

Mr. Todd gives in one part of his work an interesting sketch of the steps by which the colonies have acquired entire freedom in the regulation of their commerce, subject to certain limitations in regard to differential duties, and the observance of treaty obligations: a development of freedom which Mr. Anderson in his recent article in the *Contemporary Review* on the Future of the Canadian Dominion, forcibly deploras, with, it can scarcely be denied, some show of reason. In the case of Canada, the special instructions to colonial governors to reserve all bills, imposing differential duties (as also similar instructions as to other matters) are no longer issued, having been first omitted in the instructions to the Marquis of Lorn in 1878. Mr. Todd gives an account of the making of this change, and of the important part taken by Mr. Edward Blake therein, who observes in a passage quoted (p. 86), that the Crown

necessarily retains all its constitutional rights and powers, which would be exercisable in any emergency in which mutual good feeling, and proper consideration for imperial interests on the part of Her Majesty's Canadian advisers might be found to fail. And Mr. Todd points out (p. 139) that it is important to notice the continual exercise of imperial ascendancy over legislation in Canada up to the present time. He gives precedents of bills disallowed by the imperial Government, not only on the ground that they infringed upon the royal prerogative, but for other reasons, such for example as because repugnant to the B. N. A. Act or other imperial Acts, or because their provisions exceeded the powers of the Dominion Parliament.

In the case of all other governors however, except the Governor-General of Canada, the royal instructions direct the reservation of certain specified bills for the signification of Her Majesty's pleasure thereon. Such bills are bills affecting currency, the army and navy, differential duties, the operation and effect of treaties with foreign powers, and any enactments of an unusual nature touching the prerogative, or the rights of the Queen's subjects not resident in the particular colony, in short matters of imperial concern. (see Todd p. 131). And it is this necessity of protecting imperial interests which has led to the prerogative of vetoing legislation remaining in active exercise in the colonies, whereas it has fallen into disuse in England. Though even there Mr. Todd is careful to maintain that it still exists, and might in emergency be exercised. (p. 125.)

And in this connection Mr. Todd alludes (p. 184) to the recent appointments of Agents-general deputed by different colonies to reside in London, and watch over the interests of their respective colonies, and generally to transact business

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on behalf of their respective colonies with the imperial Government.

Finally, in respect to this subject, Mr. Todd remarks (p. 189) :—

“The B. N. A. Act of 1867, in distributing the powers exerciseable under its provisions, and in vesting ‘exclusive’ right (secs. 91, 92, 93) of legislation in certain specified matters, either in the Dominion Parliament or Provincial Legislatures, has in no respect altered the relation of Canadian subjects to the imperial Crown or Parliament, or interposed any additional obstacle to prevent imperial legislation in reference to Canada in any case of adequate necessity.”

For he says :—

“No parliament is competent by its own act or declaration to bind or restrain the freedom of action of a succeeding parliament.”

This reasoning appears so self-evident that it is surprising to find Mr. O’Sullivan maintaining in his Manual (p. 60) that “It would appear that *neither the Imperial authorities* or the Provincial Legislatures have any power to legislate on these subjects” (i.e., these reserved to the Dominion Parliament by the B. N. Act). Mr. Watson, in his volume on the Powers of the Canadian Parliament, takes the same view as Mr. Todd. He says :—

“Political imagination, in its most fervid and patriotic flights, would shrink from picturing the Imperial and Federal Legislatures as the possessors of co-equal powers. Still, there may be a few who fancy that the B. N. A. Act, while giving pre-eminence to the Ottawa House of Commons as respects the Provincial Parliaments, constitutes it, in a mysterious and definite manner, the compeers of the Imperial Legislature. For better or for worse, they will never be compeers.”

This paper is already far too long to admit of any reference to the other important matters in relation to imperial connection treated of by Mr. Todd ; such as treaty obligations,—appeals to the Privy Council, and military and naval control. The object of these articles have been, not so much to call attention to Mr Todd’s book,—it stood in no need of that,—much less to presume to add to

the praise it has already received in many quarters, as for example, in the English Law Journal for August 7th ult. The object has rather been to bring out, in some degree, what appears to be the most interesting lesson it teaches. It shows that the British empire is after all a real empire : that, though the general public may not hear of them, despatches are constantly passing to and fro between the Home authorities and the Colonies, and the imperial government is constantly exercising not only direct control in imperial matters, but also that “paternal influence” which Mr. Todd (see p. 126-sq :) dwells upon and illustrates. He must be a bold man who would deny the hand of Providence in the spectacle of England, the home of Parliamentary Government, enabled, though no deliberate design of her own, to guide and help the progress of young communities in the application of the principles of Parliamentary Government in every quarter of the globe.

F. L.

SELECTIONS.

LORD JUSTICE THESIGER.

We regret to record the death of Lord Justice Thesiger, which occurred on the 20th Nov. During the last nine days, inflammation of the ear (which may have been due to want of caution in sea-bathing) spread internally and led to blood-poisoning. This, it is said, was the proximate cause of death. The Right Hon. Alfred Henry Thesiger was the third son of the first Baron Chelmsford (Lord Chancellor in 1858 and again in 1866), by Anne Maria, youngest daughter of Mr. William Tinning, of Southampton. The late Lord Justice was born in 1838, and educated at Eton and Oxford. His papers in the schools were so well done that, upon his going in for the *vivâ voce* part of his examination, the examiner advised him to allow

LORD JUSTICE THESIGER.

the whole of his pass papers to be annulled, and to go in for honours. He, however, reserved himself for the school of law and history; but, his health failing, he was eventually obliged to take an ordinary pass degree. In Trinity Term, 1862, he was called to the bar. He worked assiduously, and became a favourite with members of both branches of the profession for his modesty and genuine, but unobtrusive, attainments. He had the invaluable aid to an advocate with his fellows of being known never to take an advantage not permitted by the rules of the game. Mr. Thesiger was always looked upon as the soul of honour and the model of professional etiquette and integrity. *Causes célèbres* he was not often concerned with; his practice lay in paths quieter, but not less avenues of fame. He held, however, a junior brief in the great Roupell case. He had the appointment of "postman" in the Court of Exchequer, which entitles the holder to precedence in making motions, even before the Attorney-General in other than Crown cases, and to a comfortable seat in Court. At one time he was frequently to be seen in the committee-rooms of the Houses of Parliament; but he made up his mind to resign this part of his practice, and returned all his Parliamentary briefs. He applied to Lord Selborne for silk, and was made Q.C. in 1874 by the present Lord Chancellor. In distinction from the ordinary practice, which is to make a batch of Queen's Counsel at a time, Mr. Thesiger alone was added to the list of Her Majesty's Counsel, and took his seat within the bar. Leading business fell to his lot at once in remarkable profusion. No advocate was heard more often in heavy commercial cases; in compensation cases he was the regular opponent of Sir Henry Hawkins. Eloquence was never ascribed to him; but his fair and common-sense way of presenting facts, and his complete mastery of details—above all, the virtue of always reading his instructions—gave him great power with juries. With the judges, his habit of close reasoning and power of lucid argument prevailed. He had the reputation of being an excellent lawyer; and it was notorious that no counsel was listened to with more attention in the House of Lords. In 1877 he was made

Attorney-General to the Prince of Wales, in succession to Mr. Loch—an appointment he was not to hold for many weeks. He had been elected a bencher of his Inn in 1874, and in 1876 sat on the commission to which the Fugitive Slave Circular was referred. Mr. Thesiger had never made an attempt to enter Parliament, but in the election that was impending it was understood to be his intention to issue an address on the Conservative side. During the year, however, the post of Lord Justice of Appeal fell vacant by the resignation of Sir Richard Amphlett, and Mr. Thesiger was nominated to the vacant place. The appointment took most people by surprise.

Lord Justice Thesiger's startling and untimely death puts an end to those anticipations of his career to which his sudden and unexpected elevation to the Court of Appeal, three years ago, gave birth. There were persons who saw more in the appointment than an example of the prediction of Lord Beaconsfield—with whom, as Prime Minister, the nomination of Lords Justices rested, rather than with the Chancellor—for young men in the service of the State, and a graceful reparation for Mr. Disraeli's supersession of Lord Chelmsford in 1868. A parallel was drawn between the progress of Lord Cairns and that of Mr. Thesiger, and, in spite of the fact that the new Lord Justice had never been in the House of Commons, he was pointed at, with some confidence, as the future Conservative Chancellor. Whether there was any ground for a kind of prophecy not uncommon at such times among ingenious persons, it is now hardly likely that it will ever be known; but there was much in Lord Justice Thesiger's powers and position to support the theory that Lord Beaconsfield wished to hold him in reserve for the woollack. As a sound lawyer, an industrious worker, with a good presence and ample powers of expressing himself, and as bearing a reputation for integrity and honour something like that of the *preux chevalier*, Lord Justice Thesiger would not have brought discredit on the woollack. What he wanted was brilliance, and there are occasions when other qualities make up for the lack of it.

Lord Justice Thesiger's career conveys

LORD JUSTICE THESIGER—THE LASH.

the impression of a man who was always worked up to the highest pressure of his powers, both physical and intellectual. He was not one of those of whom there have been many examples in English legal history—men who made their way, in spite of adverse circumstances, by force of genius and perseverance alone. He was rather one who, being placed in the best situation for success, was quite equal to the situation, and succeeded. He would not have succeeded had he not possessed great industry and conscientiousness. Those who sent their briefs to Mr. Thesiger knew that the law and facts would be mastered by him. He acquired by labour what others had by intuition, and was able to equal and sometimes beat them in the race. He had not the facility for picking up facts as the case proceeded, and perceiving the law as if by intuition; but, by hard work, he made himself practically almost as effective a forensic ally as if he had been gifted by nature with these qualities. The process he pursued was in the highest degree creditable to his powers of application and self-constraint; but it required great bodily and mental exertion. Without any wild theorising, it may well be supposed that under this strain the machine wore out. The rest which the bench supplied—coming, although it did, much earlier than any one born under inferior auspices could have expected—was not sufficient to restore the balance. He was not long enough on the bench to make a judgment of his judicial capacity possible. The moral qualities which had served him so well at the bar asserted themselves in the higher position. He was patient, dignified, and painstaking. It fell to his lot to prepare several of the judgments of the Court of Appeal in the cases in which he took part, and they are examples of close reasoning and clear expression. He also exhibited great independence of judgment. As recently as last February he differed in opinion from the Master of the Rolls and Lord Justice Baggallay in the case of *In re Hallet's Estate*, 49 Law J. Rep. Chanc. 415, being of opinion that the Court of Appeal ought not to overrule a previous case decided in the same Court—an opinion in which it is not presumptuous to say that he was

supported by professional opinion. The judgment on the career of Lord Justice Thesiger will be that he deserved success; that he was in a position to attain it; and that, in availing himself to the full of his opportunities, he displayed qualities of a high order.—*Law Journal*.

THE LASH.

On the 15th ultimo one of the most brazen-faced ruffians who ever stood up in a British court suddenly wilted and uttered a scream, on hearing the terms of the judge's sentence, and was taken away in a fainting condition. He had no defence. The evidence against him was conclusive. He was sure of conviction and of a severe sentence, and he knew it. But he was not prepared for one part of the punishment prescribed by Mr. Justice Stephen. He screamed and almost fainted, not in view of the twenty years of penal servitude, but because the judge ordered, as a fitting prelude, thirty lashes from a cat-o'-nine-tails. This man had robbed and attempted to murder by drugging, and then throwing from a railway carriage, a travelling companion, in whose confidence he had artfully ingratiated himself. It was a premeditated crime of the most heinous kind. It would have ended in murder but for the inability of the assassin to eject his victim from the car before the train stopped. The ruffian then escaped with his booty, but was followed by the half-stupefied, badly-injured man, who staggered upon the platform and gave an alarm which led to the capture of his assailant. This strange affair took place in a car (of the London underground line), of which the two men were the only occupants. Mr. Justice Stephen, in passing sentence, said it was "the most cowardly and brutal outrage that had ever been brought under his notice." He marked his sense of horror, as well as made the sentence a wholesome caution to all other minded desperadoes, by prefixing the thirty lashes to the twenty years' imprisonment. The prisoner would not have flinched from the incarceration, but he winced terribly under the judgment of the cat, as if he already felt her nine tails raising whales on his back. It is the uniform experience of British judges that corporal punish-

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ment is the most certain known deterrent of cowardly and brutal offences. When any peculiarly shocking crime against the person begins to become common in England, the judges always check it by ordering a dose of the cat well laid on, in addition to a long term of imprisonment with hard labour. This is the best known preventive for outrages on women and children. It is the only thing that has put a stop to garrotting. Its success is so marked in the declining frequency of cruel and malicious assaults upon the person in England, that the British public almost unanimously approve of it. Only a little minority of those philanthropists, whose sympathies for criminals rise in exact proportion to the diabolism of their proteges, continue to protest against the lash as a remedial agent of society. While that agent does so manifestly good a work in England, it will be judiciously conserved there. The theoretical opposition to it in the United States is widespread and intense, as any man finds out to his cost who proposes to re-introduce it in our judicial system. But now and then thinking Americans will brave the consequences and ask themselves and their neighbours if corporal chastisement, so common among our ancestors as a penalty for minor violations of law, might not be revived, with signal advantage to society, for the punishment of certain specially atrocious crimes.—*New York Sun*.

DRAWING, HANGING, AND QUARTERING.

There appears to be much misapprehension existing as to the English punishment for treason, and this may be a fitting occasion on which to point out that the sentence of decapitation, pure and simple, is one unknown to the English law (for the innovations of the long Parliament and Commonwealth, of course, legally go for nothing). The same doom of drawing, hanging, evisceration, dismemberment, and quartering was passed on peer and peasant alike (of course, I except the fair sex, whose inviolable sentence was combustion), but constitutional lawyers held that, inasmuch as the sovereign could, in his mercy, remit the whole of the penalty,

so he had the power to dispense with any part. Thus, usually in the case of peers and connections of noble families, decapitation was, by the King's grace, all that was exacted. The soundness of this theory of the royal prerogative was doubted by Lord William Russell in the case of Lord Stafford, executed for alleged complicity in the pretended Popish plot, in the reign of Charles II. The rather overrated husband of Rachel Wriothesley, with a brutal fanaticism that does not display his character in a favourable light, eagerly craved that his political opponent should undergo to the full the whole of the degradation and suffering involved in his sentence. Charles, however, exercised his prerogative. When Lord Russell's own turn came, for his share in the Rye House Plot, the King again displayed this peculiar form of clemency, accompanying the remission with the sardonic remark: "My Lord Russell shall now experience that I do indeed possess that power which he denied me in the case of my Lord Stafford." But, to return. The drawing, as every legal scholar knows, means the drawing of the criminal to the place of execution, and therefore precedes the infliction of death. According to Mr. Justice Blackstone, vol. iv., "drawing" formally meant, and formerly actually involved, dragging the condemned along the ground by a rope tied round his legs to the place of execution; and this torture the judgment literally ordains. "But," says the learned author of the "Commentaries," "usually a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement." This quaint view of indulgence seems of a piece with the same legal sage's oft-quoted vindication of the humanity and propriety of the English law in the judgment for treason passed upon women alluded to above. The passage is worth consulting. The last criminals "drawn" to the gallows were, I believe, Col. Despard and his gang. As they were to be executed in the prison in which they were confined, and as the Government insisted that they should be "drawn," this grimly humorous expedient was had recourse to. The conventional sledge or hurdle—the body of a cart or tumbril

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without the wheels—was introduced into the prison-yard, and the condemned men entered it in batches of two at a time (except the Colonel, who had the honour of an appearance *en seul*) at the door of the staircase leading to their cells, and the vehicle thus making four trips, its miserable passengers were “drawn” across the flagged space to the foot of the stairs leading to the tower on which they were to die. When the vehicle returned, after its third journey, to take up the Colonel, that gentleman remarked—and no wonder—“Ha, ha! what nonsensical mummery is this?” The late Dr. Doran tells us (“London in the Jacobite Times”) that when, during the horrid year that followed the ‘45, the sledges arrived to receive their wretched occupants outside the gates of Newgate, to set forth on their ghastly progress to Tyburn or Kennington Common, the polite keeper of the jail would announce the fact to the moribund in these courteous terms: “Now, gentlemen, if you are quite ready, your carriages are at the door.”—*Notes and Queries*.

COMPELLING PRISONER TO FURNISH PERSONAL EVIDENCE OF HIS IDENTITY.

One of the most interesting questions in the law, and one of frequent recent occurrence is, how far can a person accused of crime be compelled to furnish personal evidence of his identity with the perpetrator, and thus to make evidence against himself? It will be useful to group and review the decisions *pro* and *con*.

To commence with the most recent. In *State v. Ah Chuey*, 14 Nev. 79, on a question of personal identity, in a trial for murder, a witness testified that the defendant had certain tattoo marks on his person. The court compelled the defendant, against his objection, to expose his person to the jury. *Held*, no error. This was held by two judges, the third dissenting in a very learned and able opinion, to which we shall advert. The prevailing opinion is elaborate, and likens the exposure in this case to compelling a prisoner to remove a veil or mask. The distinction however is, that there the

prisoner tries to conceal evidence which is ordinarily visible, and from which the jury have a right to draw a conclusion, and the removal simply restores that evidence. The prisoner has no more right to hide his face than to secrete his whole person. The court also liken the ruling to the searching a prisoner and finding false keys or stolen property upon him. The sufficient answer to that is, that such things are not part of his person, but are circumstances by which he has surrounded himself. When these circumstances are disclosed, it is not the man who is compelled to give evidence against himself, but the circumstances by which he has environed himself. The conclusion of the court is “that no evidence of physical facts can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the Constitution.” This decision cited with approval the North Carolina decisions and distinguished the Tennessee case which we shall allude to.

In *Walker v. State*, 7 Tex. Ct. App. 245, on the trial of an indictment for murder, the prosecution were allowed to prove that the examining magistrate had compelled the prisoner to make his footprints in an ash-heap, and that they corresponded with footprints found at the scene of the crime. *Held*, no error. Counsel acutely argued that “if the prisoner can be compelled to make an impression with his foot in order to see if it is similar to the impression made by the foot of the person who committed the crime, then if he were charged with forgery he could be compelled to take a pen, and write, in order to see if his handwriting was similar to that of the party who committed the forgery.” (This he may now by statute be compelled to do in England.) This decision is founded on *State v. Graham*, *infra*, and *Stokes v. State*, *infra*, is distinguished on the ground that there “the prisoner was asked in the presence of the jury to give evidence against himself”—a perfectly futile distinction, as we shall see. The worst of this decision is that it permits secondary evidence of incompetent evidence—evidence of an experiment out of court, which, if tried in Court, might

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not have been conclusive against the prisoner.

In *State v. Graham*, 74 N. C. 646; S. C., 21 Am. Rep. 493, an officer, who had arrested a person charged with larceny, compelled him to put his foot in a track found near where the larceny was committed, and testified as to the result of the comparison. *Held*, no error. The court say, "no hopes or fears of the prisoner could produce the resemblance of his track to that found in the cornfield." They instance the case of a fragment of a knife-blade found sticking in a window, and its correspondence with the blade of a knife found in a prisoner's pocket; the similar case of gun-wadding found in a wound, and evidently torn from paper in a prisoner's pocket; the correspondence of marks on a prisoner's face with the wards of a key with which he was struck at the time of the commission of the offence; and ask: "If an officer arresting one charged with an offence had no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment of paper corresponding with the wadding, have been found. If when a prisoner is arrested for passing counterfeit money, the contents of his pocket are sacred from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of the *scienter*? If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged?" They then instance a veil and a mask. This is fairly the substance of the opinion, and we have already sufficiently commented on this line of argument.

In *State v. Garrett*, 71 N. C. 85; S. C., 17 Am. Rep. 1, at a coroner's inquest, upon the body of a person found dead, it was proved that defendant had said that deceased was accidentally burned to death, and that defendant had burned her own hand in trying to put the fire out. Defendant being then in custody on suspicion of having murdered the deceased, was ordered by the coroner to show her hand, which she did, and it

appeared uninjured. *Held*, that evidence of such fact was admissible upon the trial of defendant for murder. This might be classed with the mask and veil as an instance of an attempt to conceal evidence ordinarily visible. The jury, of course, have a right to scrutinize patent facts, such as stature, shape, complexion, hair, features, scars, loss or peculiarity of members, etc. These are public matters, which the public cannot be prevented from viewing, and which the prisoner knows are liable to comment and comparison. Of these, witnesses who observed them may speak, or the jury may look at them in court. So if witnesses have observed the patent characteristics of gait and voice, they may testify to them, or the jury may observe the prisoner's gait as he voluntarily and naturally walks, or his voice as he voluntarily speaks. But will it be contended, that on a question of resemblance of gait, the court can compel the prisoner to get up and walk, or that on a question of voice, they can compel him to speak?

The foregoing are the only cases holding this doctrine. On the other hand is *Stokes v. State*, 5 Baxt. 619; S. C., 30 Am. Rep. 72. On an accusation of murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court, and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted, *held*, that he was entitled to a new trial. It is impossible to distinguish this case. If the court had considered the evidence competent, it would have compelled the prisoner to "make tracks," or instructed the jury that his refusal might be considered against him. The court said: "In the presence of the jury the prisoner is asked to make evidence against himself." That is exactly what he was asked to do in the tattoo case, and what he was

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compelled to do in the *Graham* case. It is immaterial whether he is compelled to do it out of court or in court. The distinction drawn by the court in the *Walker* case against the *Stokes* case, would apply just as well to the *Graham* case.

In *People v. McEvoy*, 45 How. Pr. 216, an indictment of a woman for murder of an illegitimate child at birth, the coroner had directed two physicians to go to the jail and examine her private parts to determine whether she had recently been delivered of a child. She objected to the examination, but being threatened with force, yielded, and the examination was had. Their evidence was offered on the trial, and ruled out. The court said the proceeding was in violation of the spirit and meaning of the Constitution, which declares that "no person shall be compelled in any criminal case to be a witness against himself." "They might as well have sworn the prisoner, and compelled her, by threats, to testify that she had been pregnant and had been delivered of a child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child." "Has this court the right to compel the prisoner now to submit to an examination of her private parts and breasts, by physicians, and then have them testify that from such examination they are of opinion she is not a virgin, and has had a child? It is not possible that this court has that right; and it is too clear to admit of argument that evidence thus obtained would be inadmissible against the prisoner."

Leonard, J., dissenting in the tattoo case, said among other things: "I think the framers of the Constitution, and the people who adopted it, intended, that at criminal trials, the accused, if such should be his wish, should not only have the right to close his mouth, but that he might fold his arms as well, and refuse to be witness against himself in any sense or to any extent, by furnishing or giving evidence against himself, whether testimony under oath or affirmation, or confessions or admissions without either, or proofs of a physical nature." "If

witness Rhoades had testified that he knew the defendant was Ah Chuey, because he was a good English writer, and had for years kept a diary; that he wrote in it every day, and signed his name "Ah Chuey," to each entry; that he saw the book a few minutes before coming into court; that defendant then had had the book on his person, would any one say that the court, without error, could have compelled him to show the book to the jury? And yet why not, on principle, if he could be compelled to exhibit a private, harmless mark, for the same purpose? The object would have been to ascertain the truth, and the result would have verified the statement. Suppose, instead of the hand and bust of a woman, he had written upon his breast, in India ink, the words, "I am Ah Chuey," why could those words be shown with more propriety than the words in the diary, and could they not have been shown if it was proper to compel him to exhibit the mark?" "Had the identifying mark been upon some portion of the body not concealed, and had the jury seen it by reason of the defendant's presence in court, I do not say that they could not have acted upon the fact so observed. What I say is, that whether the mark is concealed or not, the court cannot compel a defendant, for the purpose of identification, or any other, the tendency of which is to criminate, to exhibit himself, or any part of himself before the jury as a link in the chain of evidence." "Had the district attorney asked the defendant whether he had on his right forearm the tattoo mark described, and had the court, against the defendant's consent, compelled him to answer that he had such a mark, there can be no doubt that such action would have been a grave error. Could the court, at the trial, in the presence of the jury, by other and forcible means, accomplish indirectly what it could not do by direct means?"

Neither Warton nor Bishop express any opinion on this question, but it seems to us that on principle a prisoner cannot be compelled to say anything, or do anything, nor submit to any act addressed to his actual person, which may tend to criminate him.—*Albany Law Journal*.

NOTES OF CASES.

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SUPREME COURT.

OCTOBER SESSIONS, 1880.

APPEAL FROM THE SUPREME COURT OF NOVA
SCOTIA.

FRASER, *Appellant*, v. TUPPER, *Respondent*.
Appeal—Habeas Corpus—38 Vict. c. 11,
sec. 23.

The appellant, imprisoned under executions for penalties for selling liquors without license (Rev. Stat. N.S., 4 series, c. 75) applied under Rev. Stat. N.S., 4 series, c. 99, "An Act for securing the liberty of the subject," for a discharge. The order was made returnable before the Supreme Court of Nova Scotia, and the discharge was refused. Before instituting an appeal from the judgment of the Supreme Court of Nova Scotia, the appellant, whose time for imprisonment had expired, was at large. On motion to dismiss the appeal for want of jurisdiction, the Supreme Court.

Held, that an appeal will not lie in any case of proceedings upon a writ of Habeas Corpus, when at the time of the bringing of the appeal the appellant is at large.

Graham, for respondent,
Bigby, Q. C., for appellant.

EXCHEQUER COURT.

ROBERTSON, *Suppliant*,
THE QUEEN, *Respondent*.

B. N. A. Act, sec. 91 & 92; 31 Vict. c. 60—*Fishing leases issued under authority of s. 2 of said Act—Validity of—Exclusive right of fishing ad flum aquæ in rivers above tidal waters in New Brunswick—Rights, as riparian proprietors, of the Nova Scotia &c., Land Company.*

On the 5th November, 1835, a grant issued to the Nova Scotia and New Brunswick Land Company of 580,000 acres, which included within its limits that portion of the Miramichi above tidal waters, covered

by a fishery lease issued to the suppliant on the 1st January, 1874, by the Minister of Marine and Fisheries under the provisions of the Act of the Parliament of Canada, intitled "An Act for the regulation of fishing and protection of the Fisheries," 31 Vict. c. 60. During the year 1875, J. S. and E. H., with the permission and consent of and under and by virtue of conveyances from the said N. S. and N. B. Land Company, entered, and fished for, and caught salmon by fly-fishing upon the portion of the river so leased, and the suppliant prevented them from fishing thereupon. J. S. and E. H. sued and recovered against the suppliant damages before the Supreme Court of New Brunswick. The suppliant by his petition of right prayed for compensation for losses sustained through the illegal issue of a lease by the Dominion Government, and the following questions were submitted in the special case.

"1. Had the Parliament of Canada power to pass the 2nd section of said Act, entitled "An Act for the regulation of fishing and protection of the fisheries?"

2. Had the Minister of Marine and Fisheries the right to issue the fishery lease in question?

3. Was the bed of the S. W. Miramichi within the limits of grant to the Nova Scotia and New Brunswick Land Company, and above the grants mentioned and reserved therein, granted to the said Company?

4. If so, did the exclusive right of fishing in said river thereby pass to the said Company?

5. If the bed of the river did not pass, had the Company as riparian proprietor the right of fishing *ad flum aquæ*; and if so, was that right exclusive?

6. If an exclusive right of fishing in a portion of the Miramichi River passed to said Company, could the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the river?

7. Where the lands (above tidal waters), through which the said river passes, are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?"

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Held, 1. That all subjects of legislation of every description whatever are within the jurisdiction and control of the Dominion Parliament to legislate upon, except such as are placed by the B. N. A. Act under the exclusive control of the local legislatures, and nothing is placed under the exclusive control of the local legislatures unless it comes within some, or one, of the subjects specially enumerated in the 92nd section, and is at the same time outside of the several items enumerated in the 91st section, that is to say, does not involve any interference with any of those items.

2. That the effect of the closing paragraph of the 91st section, namely, "and any matter coming within any of the classes of subjects enumerated in the 91st section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces," is to exclude from the jurisdiction of the local legislatures the several subjects enumerated in the 92nd section in so far as they relate to, or affect any of, the matters enumerated in the 91st section.

3. That by sub-sec. 12 of sec. 91, B. N. A. Act, the fisheries, or right of fishing in all rivers running through ungranted lands in the several Provinces as well as in all rivers running through lands then already granted, as distinct and severed from the property in, or title to, the soil or beds of those rivers, were placed under the exclusive legislative control of the Dominion Parliament, and that the statute 31 Vict. c. 60 is *intra vires* of the Dominion Parliament.

4. That by the following words in sec. 2 of c. 60, 31 Vict., viz:—"where the exclusive right of fishing does not already exist," the rights of all persons seized and possessed of the right of fishing in rivers above tidal waters, either as a right incident to ownership of the bed and soil covered by such waters, or otherwise, were preserved.

5. That the true construction of the letters patent from the crown to the Nova Scotia and New Brunswick Land Company bearing date the 3rd of November, 1825,

was to convey to them the bed or soil of the south-west branch of the Miramichi River, where it passes through the lands so granted and with the exclusive right of fishing therein, *ad flum aquæ*, and therefore that the Minister of Marine and Fisheries was not authorized under 31 Vict. c. 60 to grant a salmon fishery license for that portion of the South-west Miramichi river.

Haliburton, Q. C., for suppliant.

Lash, Q. C., for respondent.

The following are extracts from the judgment of

MR. JUSTICE GWYNNE.—The right of fishing in rivers above the ebb and flow of the tide may exist as a right incident upon the ownership of the soil or bed of the river or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person and the right of fishing in the waters covering that bed may be wholly in another or others. Now that the B. N. A. Act did not contemplate placing the title or ownership of the beds of fresh water rivers in the Dominion Parliament under the control of the Dominion Parliament, so as to enable that Parliament to affect the title of the beds of such rivers sufficiently appears, I think from the 109th section, by which "all lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union," are declared to belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate, and this term "lands" in this section is sufficient to comprehend the beds of all rivers in those ungranted lands. We must, however, in order to give a consistent construction to the whole Act, read this 109th section in connection with and subject to the provisions of the 91st section, which places "all fisheries," both sea coast and inland, under the exclusive control of the Dominion Parliament. Full effect can be given to the whole Act by construing it, (and this appears to me to be its true construction) as placing the fisheries or right of fishing in all rivers running through lands then already granted as distinct and severed from the property in, or title to, the soil or beds of the rivers,

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under the exclusive legislative control of the Dominion Parliament. So construing the term "fisheries" the control of the Dominion Parliament may be, and is, exclusive and supreme without its having any jurisdiction to legislate so as to alter in any respect the title to or ownership of, the beds of the rivers in which the fisheries may exist. That title may be, and is in the grantees of the crown where the title has passed, or may pass hereafter by grants to be made under the seal of the several provinces, in which the lands may be, but the exclusive right to control the "fisheries," as a property or right of fishing distinct from ownership of the soil, is vested in the Dominion Parliament.

So construing the term it must be held to comprehend the right to control in such manner as to Parliament in its discretion shall seem expedient, all deep sea fishing and the right to take all fish ordinarily caught either on the sea coast or in the great lakes, or in the rivers of the Dominion.

Now the Act under consideration, viz : 31 Vict. c. 60 maintains the like scrupulous respect for private rights as the old Acts which it repealed had done ; for by the 2nd section the power given to the Minister of Marine and Fisheries to issue leases or licenses is confined expressly to those places "where the exclusive right of fishing does not already exist by law," following the provision of the Canada Statute 29 Vict. c. 11, sec 18. In all matters placed under the control of Parliament, all private interests whether provincial or personal must yield to the public interests and to the public will in relation to the subject matter as expressed in an Act of Parliament, constituted as the Dominion Parliament is, after the pattern of the Imperial Parliament and consisting as it does of Her Majesty, a Senate, a House of Commons as separate branches, the latter elected by the people as their representatives, the rights and interests of private persons, it must be presumed, will always be duly considered, and the principle of the British Constitution which forbids that any man should be wantonly deprived of his property under pretence of the public benefit or without

due compensation be always respected. It is however, in Parliament, upon the passing of any Act which may affect injuriously private rights, that those rights are to be asserted, for once an Act is passed by Parliament in respect of any matter over which it has jurisdiction to legislate, it is not competent for this, or any court to pronounce the Act to be invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in England, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament, and the terms of the Act be explicit, so long as it remains in force, effect must be given to it in all Courts of the Dominion, however private rights may be affected.

The Imperial Parliament having supreme control over the title to, or ownership of, the beds and soil of all inland waters of the Dominion, and also over the franchise or right of fishing therein as a distinct property, has, at the request of the old Provinces of Canada, Nova Scotia and New Brunswick, as the same were constituted before the passing of the B. N. A. Act, so dealt with those subjects as, while leaving the title to the beds and soil of all rivers and streams passing through or by the side of lands already granted in the grantees of such respective lands, to place the franchise or right to fish, as a separate property distinct from the ownership of the soil, under the sole, exclusive and supreme control of the Dominion Parliament. Construing then the term "Fisheries" as used in the B. N. A. Act, as this franchise or incorporeal hereditament apart from and irrespective of the title to the land covered with water in which the fisheries exist, it seems to me to be free from all doubt that the jurisdiction of Parliament over all fisheries, whether sea coast or inland, and whether in lakes or rivers, is exclusive and supreme, notwithstanding that in the rivers and other waters wherein such fisheries exist, until Parliament should legislate upon the subject, private persons may be seized and possessed of the right of fishing in such waters either as a right inci-

dent to the ownership of the beds and soil covered by such waters, or otherwise * * *

[After reviewing the nature, condition and title of the particular property in question, and referring to a number of cases, the learned Judge continued,]

The principles to be deduced from all these cases seem to be that—in the estimation of the common law all rivers are either navigable or not navigable; and rivers are only said to be navigable so far as the ebb and flow of the tide extends. Rivers may be navigable in fact, that is, capable of being navigated with ships, boats, rafts, &c., &c., yet be classed among the rivers not navigable in the common law sense of the term, which is confined to the ebb and flow of the tide. Rivers which are navigable in this sense are also called public, because they are open to the public use and enjoyment freely by the whole community, not only for the purposes of passage, but also for fishing, the crown being restrained by Magna Charta from the exercise of the prerogative of granting a several fishery in that part of any river. Non-navigable rivers, in contrast with navigable or public, are also called private, because although they may be navigable in fact, that is, capable of being traversed with ships, boats, rafts, &c., &c., more or less, according to their size and depth, and so subject to a servitude to the public for purposes of passage, yet they are not open to the public for purposes of fishing, but may be owned by private persons, and in common presumption are owned by the proprietors of the adjacent land on either side, who in right of ownership of the bed of the river, are exclusive owners of the fisheries therein opposite their respective lands on either side to the centre line of the river. Magna Charta does not affect the right of the Crown, nor restrain it in the exercise of its prerogative of granting the bed and soil of any river above the ebb and flow of the tide, or granting exclusive or partial rights of fishing therein as distinct from any title in the bed or soil, and in fact, crown grants of land adjacent to rivers above the ebb and flow of the tide, notwithstanding that such rivers are of

the first magnitude, are presumed to convey to the grantee of such lands, the bed or soil of the river, and so to convey the exclusive right of fishing therein to the middle thread of the river opposite to the adjacent land so granted. This presumption may be rebutted, and if by exception in the grant of the adjacent lands the bed of the river be reserved, still such reservation does not give to the public any common right of fishing in the river, but the property and ownership of the river, its bed and fisheries remain in the crown, and the bed of the river may be granted by the crown, and the grant thereof will carry the exclusive right of fishing therein; or the right of fishing exclusive or partial may be granted by the crown to whomsoever it pleases, just as any person seised of the bed of a river might dispose thereof. This right extends to all large inland lakes also, for although in their case the same presumption may not arise as does in the case of rivers, namely that a grant of adjacent lands conveys *prima facie* the bed of the river, still the prerogative right of the crown to grant the beds of rivers above the ebb or flow of the tide, not being affected by the restraints imposed by Magna Charta, cannot be questioned, for all title of the subject is derived from the crown, and so if a bed of a river or right of fishing therein be reserved by the crown from a grant of adjacent lands, the right and title so reserved remains in the crown in the same manner as it would have vested in the grantee, if not reserved, and is not subject to any common right of fishing in the public, for as was said by Lord Abinger, in *Hull v. Selby Ry Co.*, 5 M. & W. 327, as all title of the subject is derived from the crown "the crown holds by the same rights and with the same limitations as its grantee." So in *Bloomfield v. Johnson*, 8 I. L. R. C. L. 68 it was held that a grant by the crown of a free fishery in the waters of Lough Erne did not pass a several or exclusive right of fishery therein, but only a license to fish on the property of the grantor, and that the several fishery remained in the crown subject to such grants or license to fish as it might grant. In old Canada the right of the crown to make such

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grants of the bed of the great lakes is recognised by Act of Parliament.

Although the exercise of the prerogative of the crown to grant a several fishery in waters where the tide ebbs and flows is restrained by Magna Charta, still the right of Parliament in its wisdom, in the exercise of its paramount control in the interest of the public, and as the exponent of the voice of the nation, as regards all property, to authorize such grants there equally as in waters above the ebb and flow of the tide is undoubted. I speak here of the Parliament of the United Kingdom, and the like power over all subjects, placed by the B. N. A. Act, under the control of the Parliament of Canada, is vested in that Parliament. As regards then the particular river in question, above Price's band, notwithstanding that it may be true that it is subject to a servitude to the public for a common right of passage over its waters (as to which I express no opinion, inasmuch as the determination of that point is unnecessary in the case before me); but assuming the river to be subject to such servitude, still, the river there partakes not of the character of a navigable or public, but of a non-navigable or private river in the sense in which these terms are used in law, and the public have no common right of fishing therein.

* * * * It cannot admit of a doubt that the descriptions of boundaries in every one of the letters patent which have been produced, include and convey to the several grantees of the land therein respectively described, the soil and bed not only of all the streams and rivers which flow into the Rivers St. John's and Nashwaac, but also of the River Miramichi. * * * It must be concluded as not admitting of a doubt, that every grant which had been made, prior to the 5th of November, 1835, of land lying within the limits of the description of the tract described in the letters patent of that date, passed and conveyed to the several grantees of such land without exception, the bed and soil of the Miramichi river, as well as the beds and soil of all the rivers and streams flowing into the St. John and Nashwaac, in accordance with the

general presumption and rule of law, where the lands granted abutted on any of the said rivers. * * * *

The only construction which, in accordance with the above principles, can, in my judgment, be properly given to the letters patent of the 5th November, 1835, is—that the exception therein affects the Miramichi river, only in the same manner, and to the same extent as it effected the rivers and streams therein mentioned, namely, all those falling into the Rivers St. John and Nashwaac, and consequently that the exception is limited to the bed and soil of the Miramichi river, as it is to the bed and soil of the said other rivers and streams, namely opposite to the lands which had previously been granted on the banks of the river. * * * It follows that the Miramichi river, where the lands granted to the N. S. and N. B. Company abut upon it, is excluded from the operation of the Fisheries Act, 31 Vict., c. 60, for there an exclusive right of fishing had passed to the company, their successors and assigns by the letters patent, of the 5th November, 1835.

CHANCERY CHAMBERS.

The Master,
Proudfoot, V.C. }

[Oct. 2]

DARLING V. DARLING.

Cross interrogatories—Where filed—G. O. 221.

Where a foreign commission issues on the Master's certificate under G. O. 221, cross interrogatories should be filed in the office of the Clerk of Records and Writs, and where they were filed by a defendant in the Master's office instead, and notice of filing given, but by accident the commission issued without them, an application made on the return of the commission executed, to suppress it, was refused, with costs. On appeal, Proudfoot, V.C., upheld the Master's judgment.

J. B. Thompson for applicant (defendant W. Darling).

Barwick contra.

Chan. Cham.]

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In the same case, on another application, the Master in Ordinary held as set out below :

1. Where the witness could not write and the commissioner certified to that fact, and the interpreter and commissioner signed their names, *Held*, sufficient.

2. The interpreter was not such an agent and correspondent of the complainant on the facts as would justify the suppression of the commission on that ground.

3. (a) The commissioner was an Italian.
(b) The instructions are inapplicable to the case of a commissioner unable to speak or understand English. *Held*, not material, as it did not appear that the commissioner was unacquainted with the English language.

4. There did not appear in the depositions a certificate attached that the commissioner took down the evidence required by the instructions. *Held*, immaterial.

5. That, under the instructions, the commission should be executed by one commissioner only, but, contrary thereto, the depositions of the claimant were taken by one commissioner, and those of Redford, a witness, by the other. *Held*, immaterial.

On appeal, *PROUDFOOT*; V.C., upheld all rulings.

Ewart for applicant (defendant H. Darling).

Moss, contra.

Referee.]

[June 10.]

IN RE SELBY.

Life Insurance—Presumption of Death—Practice.

This was an application by the widow and executrix of the late Mr. Selby to have the proceeds of a policy upon his life paid into court: the assured having disappeared mysteriously in the early part of 1873.

The Court made an order (following orders made by the English Court of Chancery in the same case), directing the money to be paid into court, with leave to the executrix to "apply at Chambers" for payment to her.

On the 3rd of June, 1880, *A. Creelman*

applied, on behalf of the executrix, for payment, seven years having elapsed since the disappearance of the assured.

W. F. Burton, for the Canada Life Assurance Company, consented, citing *Hoggerman v. Strong*, 4 U. C. Q. B. p. 570.

The REFEREE thought the application should have been made before a Judge in Chambers; but, after consulting with the Vice-Chancellor who made the order, *held* it was not necessary, and granted the order asked for.

Referee.]

[June 28.]

RE CURRY.

WRIGHT V. CURRY.

CURRY V. CURRY.

Payment by executor into Court—Admission—Practice—Jurisdiction of Referee.

The Referee in Chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands.

Hoyles for plaintiff.

Langton for defendant.

Spragge, C.]

[Nov. 1.]

DUNNARD V. McLEOD.

Extension of time for appealing.

Motion before Referee for an order extending the time for appealing from a former order. It appeared by affidavit of the Toronto agents for the defendant's solicitors that a clerk in their office had been instructed at the proper time to set the case down, but that he had forgotten to do so. Order refused.

On application, the CHANCELLOR remarked on the apparent variability of the recent English practice, and declined to follow *Burgoin v. Taylor*, L. R. 9 Chy. Div. 1, and dismissed the appeal, as the ultimate object of the motion was to secure dismissal of plaintiff's bill.

G. B. Gordon for appellant.

Rae for respondent.

Quebec.]

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[Quebec.]

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QUEBEC.

(From *Legal News*.)

QUEEN'S BENCH.

Re THIBAUDEAU ET AL. V. BEAUDOIN.*Bank.*

The cashier of a Bank, who has endorsed notes for a customer of a Bank, may, if in good faith, take a hypothec on the debtor's property to protect himself on the endorsements.

Re DOBIE, AND THE BOARD OF TEMPORALITIES.

Appeal to Privy Council—Injunction.

An appeal lies to the Privy Council from a judgment of the Queen's Bench dissolving an injunction, where the matter in dispute exceeds £500 sterling.

Re ANGERS, ATTY. GEN., AND MURRAY.*Appeal to Privy Council.*

The Court of Queen's Bench will refuse leave to appeal to the Privy Council from a judgment of the Q. B. rejecting an appeal to the Q. B. for want of jurisdiction.

Re LUSSIER, AND CORPORATION OF HOCHELAGA.

Appeal to the Privy Council—Future rights.

An appeal will not be granted to the Privy Council from a judgment of the Queen's Bench maintaining an action to recover an amount of assessment illegally exacted, where the matter in dispute does not exceed £500 stg. The fact that the roll under which the assessments were collected might exist for three years does not bring the case under article 1178 C.C.P., especially where the total amount for the three years would be under £500 stg.

THE QUEEN V. JONES.

Criminal law—Writ of error—Felony—Discharge of jury, effect of.

The record showed that, on the trial of the

indictment, the judge discharged the jury after they were sworn, in consequence of the disappearance of a witness for the Crown, and the prisoner was remanded. On writ of error, *held*, that the judge had a discretion to discharge the jury, which a court of error could not review; that the discharge of the jury without a verdict was not equivalent to an acquittal; and that the prisoner might be put on trial again.

Re CITIZENS INSURANCE CO. AND THE GRAND TRUNK RAILWAY.

Employee—Liability for money of his employer lost through his negligence—Guarantee bond.

An employee left a large sum of money belonging to his employers in open bags in his room, while he went to lunch, without availing himself of the means of safe-keeping provided for him. On his return from lunch the money had disappeared. *Held*, that he was guilty of negligence, so as to constitute a breach of a guarantee policy, the condition of which was that he should diligently and faithfully discharge his duty as employee.

DIXON et al. Appellants, and PERKINS et al. Respondent.

Sale of insolvent estate—Liability of assignee where a part of the assets sold is not delivered.

The assignee of an insolvent estate sold it *en bloc*, by an inventory, in which certain shares of a company were set down at \$5,642.76. The purchaser paid the total amount of the purchase on the condition that the assignee would pay for any deficiency in the assets sold, according to the pencil estimates on the inventory. It appeared that the \$5,642.76 represented the amount paid on \$15,000 of stock, that the balance was unpaid, and that paid up stock could not be delivered to the purchaser. *Held*, that the assignee was bound to return the proportionate value of paid up stock to the amount of \$5,642.76, and in the absence of any allegation that \$2,000, the pencil estimate on the inventory, was not a fair estimate, the assignee was condemned to return that sum.

CARDINAL V. DOMINION FIRE AND MARINE INSURANCE CO.*Fire Insurance—Breach of Condition—Leaving premises unoccupied.*

The insured cannot recover upon a policy which contains a condition making the contract void if the premises be left unoccupied for more than fifteen days without notice to the Company, and it appear that the premises were vacant at the time of the fire and had been so for a much longer time than fifteen days without notice.

LABANEE et al. v. EVANÉ.*Marriage of Roman Catholics—Jurisdiction—Authority of the R. C. Bishop.*

Marriage in the Roman Catholic Church is a sacrament and a spiritual and religious bond, over which the Superior Court has no jurisdiction.

Civil marriage does not exist under our law, the law merely giving civil effects to a religious marriage validly celebrated by regularly ordained ministers authorized to keep marriage registrars.

The Superior Court has power to refer to the decision of the Roman Catholic Bishop of the Diocese the question of the validity or nullity of the marriage of two Roman Catholics celebrated by a Protestant minister, and the decision of the Bishop may and ought to be followed by the Superior Court in deciding as to the civil effects of the ceremony.

THERIAULT v. DUCHARME.*Federal Elections Act—Candidate's personal expenses.*

The personal expenses of the candidate during an election, and connected therewith, are election expenses, and a detailed statement must be included in the statement required by law to be filed after the election.

*In re De la DURANTAYE, BEAUSOLEIL, assignee, and De la DURANTAYE, petitioner.**Assignee's fees—Composition—Costs of assignee's discharge.*

The assignee is entitled to the cost of obtaining his discharge as assignee, even where the insolvent has obtained from his creditors a deed of composition and discharge.

REVIEWS.**PRINCIPLES OF THE COMMON LAW**, by John Indermaur. London: Stevens & Haynes, 1880. 2nd Ed.

The first edition was only published in 1876. The present one makes some alterations rendered necessary by changes in the law, but the principal difference is in the fact that the author has added a reference to the Irish cases. This work of "the students' friend," as Mr. Indermaur may well be called, hardly needs at this day any commendation from us.

STEVENS ON INDICTABLE OFFENCES AND SUMMARY CONVICTIONS. Toronto: Carswell & Co. 1880.

Mr. Stevens is already favourably known, especially in the sister Province of New Brunswick, as an author and compiler, and his reputation will give a certain stamp of reliability to the work before us.

There is no branch of law which it is more necessary to have made easy of reference than that which relates to the duties of magistrates. Very few of these functionaries have the time to spare, or the necessary training, to enable them to become thoroughly familiar with the Acts relating, wholly or in part, to their duties, as they are to be found in the Statute Book, and any collection of the law which they are called upon to administer, if reliable, must be of great value, both for the time it will save and the feeling of security it will give. It will be of scarcely less value to the practical lawyer, as a means of ready reference, especially in courts where the Statutes are not always at hand.

The work is divided into two parts, one treating of indictable offences, and the other of summary convictions under the general laws of the Dominion. The text of the Statutes is given, and the different clauses explained or commented upon, reference being made to the decisions of the Courts. The author appears to have succeeded in producing a book which gives, in a moderate compass, an excellent compendium of magisterial duties and responsibilities, with

REVIEWS—CORRESPONDENCE

a schedule of forms, and a very full index, which adds much to the value of the work.

The typographical part of the work is exceedingly good, and reflects much credit on the publishers.

THE LIBERTY OF THE PRESS, SPEECH, AND PUBLIC WORSHIP, being Commentaries on the liberty of the subject and the laws of England, by James Paterson, M.A. London: Macmillan & Co., 1880.

Mr. Paterson is an original thinker and an original writer. We were much struck with this in his Commentaries on the laws of England, in reference to the security of the person. The present work takes up different branches of the same general subject, and they are treated in the same broad and masterly manner.

As regards the book before us, there seem no special reasons at first sight why the two subjects—The Liberty of the Press and the Security of Public Worship—should be discussed in the one volume. The reason given by the author in his previous work is, that the Security of Public Worship is only another name for the Security of Thought and Speech, when applied to one prominent subject matter. This may be true, but the connection still seems more theoretically fanciful than practical. This, however, is a matter of little moment.

The author's works are not ordinary text books, either as to matter or mode of treatment. They are written in a style peculiarly his own, and bring out new and original views on old and well-worn subjects. They seem to be the result of a very extended range of reading, bringing before the reader unexpected connections and new light from sources apparently unsought before.

The first part of the book is devoted to the law relating to the security of thought, speech, and character, and treats of the freedom of public meetings, addresses, the press and correspondence by post; restrictions as regards blasphemy and immorality; abuse of free speech; libels and their characteristics and remedies, and, finally, copyrights, patent rights, and trade marks. The second part of the work speaks of the ten-

dency to public worship, and the laws as to profane swearing and witchcraft, and a variety of matters relating to Church government, parish law, rights and liabilities of the clergy, toleration, nonconformists, &c., most of them subjects of comparatively little practical use to us in this country.

CORRESPONDENCE.

Can Division Court Clerks be garnished for money collected by them?

To the Editor of THE CANADA LAW JOURNAL.

SIR,—As the above point has received no distinct decision, and as a great diversity of opinion appears to prevail among the profession, permit me to offer a few observations pertinent thereto.

The answer to the above question depends upon the answer to this other question: is there a debt due or owing (see §124 Div. Courts Act) by the Clerk of the Court to the primary debtor? If there is such a debt, then it is surely garnishable, if not then, it is surely not garnishable. On turning to Worcester, we find a debt defined to be "That which is due to a man under any form of obligation or promise." Is the money in the Clerk's hands due to the primary debtor under any form of obligation? See rule of Court 97 also s. 27 of Division Courts Act as to covenant to be given by clerk, and form of such covenant in schedule to the Act—that the clerk "shall duly pay over to such person or persons entitled to the same all such money as he shall receive by virtue of said office of clerk." The statute, as I understand it, puts the clerk in the position of a debtor to the primary debtor. On the other hand, it is maintained that there is no "debt" in the proper sense of the term, that the clerk is the official of the Court, that his existence as a person is merged in the higher entity of the Court, that the Court is not a debtor, that the money paid into Court is paid to the primary debtor theoretically and philosophically, and that therefore, &c.

This reasoning is very refined, very complicated, very ingenious, and I submit, very unintelligible. The interpretation of the Division Courts Act, which will give the highest

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satisfaction, is that which will help the creditors to collect their debts, and not that which under shelter of a sort of ratiocination that would do credit to the days of special demurrers, will result in giving the dishonest debtor reason to laud the law as his special aider and abettor in his dishonest withholding of his creditor's due. In the note to Sinclair's Division Courts Acts, s. 124, it is stated that "money paid into court cannot be garnished," and the following cases are quoted in support of that proposition *Jones v. Brown*, 29 L. T. Rep. 79, *French v. Lewis*, 16 U.C.Q.B. 547. A reference to these cases will show them to be not the slightest authority for such a proposition stated so broadly. It may perhaps turn out to be good law, but the cases quoted are certainly no authority. There is clear authority for garnishing money in the hands of a bailiff see *Lockart v. Gray*, 2 L.J.N.S. 163, and why money in a bailiff's hands can be attached, and in a clerk's hands cannot, is, I submit, not very intelligible. If it were not for a late English authority (*Dolphin v. Layton*, L. R. C. P. Div. 4, page 130), I would think that the question is hardly on principle debatable. This decision, by Chief Justice Coleridge, on appeal from an English County Court, states that "Proceeds of a Judgment paid into the Court are not attachable by means of a garnishee summons at suit of a third person as a 'debt' due from the Registrar of the Court to a judgment debtor." If this is to be held good law in this country, then it must settle the question that such moneys cannot be garnished. I find that the English County Courts are in most respects identical with the Canadian Division Courts, and I find that the Registrar of the English County Court has imposed upon him the same statutory duty as the clerk of the Canadian Division Court—I mean that of paying money over to the owner of it on demand. At first sight one would suppose that this decision would at once settle the vexed question, but I submit it only puts an obstacle in the way of its settlement.

On looking into the report of the case, we find a well reasoned logical judgment of

the English County Court Judge finding in favour of the garnishee on the ground that the relation of the Registrar to the owner of the money is merely that of banker and customer, or that of debtor and creditor.

The primary debtor then appeals to the Queen's Bench, and we find neither the garnisher nor garnishee represented in the argument. Lord Coleridge stops the counsel for the primary debtor in his *ex parte* argument and says "I am clearly of opinion that money in the hands of the Registrar as an officer of the County Court is not subject to process of attachment," and Denman J. follows—"I am of the same opinion, I see no distinction in this respect between the Registrar of the County Court and the Master of one of the Superior Courts." Now this decision may perhaps for some occult reason be good law, but I must demur to the *ratio decidendi*. If it means anything, it means by parity of reasoning that Mr. Dalton, the Master of the Court of Queen's Bench, bears the same relation to money paid into his Court, as Mr. Howard, the clerk of one of the City Division Courts, bears to money paid into his Court. If this is so, it is somewhat startling. Mr. Dalton has no authority to pay money over to the client on demand, he has no such statutory duty imposed upon him—in other words, he owes nothing to the client. He is, as I understand, the personification of the Court for certain definite purposes; if a client wants money paid out to him, he must get a judge's order countersigned by the Master, upon production of which the Court or the Court's Bank pays over the money. The Master has no control over that money. The clerk of the Division Court is in a different position; so soon as the money is paid into his hands, he becomes *dominus pecunie* he owes the client; no judge's order, nor other proceeding to create a debt is necessary.

The Division Court is by statute a Court of Equity. A reference to the principles and practice of attaching money paid into the Court of Chancery is useful to assist in interpreting the equitable functions of the Division Court. It has been decided in *Wilson v. McCarthy*, 7 P. R. 132, that

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a creditor with a *fi. fa.* can on his *ex parte* motion obtain a stop order on funds in court. He can then by notice of motion obtain payment out to him of his debtor's money or share of money. This is nothing but garnishment of money in court. Of course the Chancery Orders and practice do not apply to the Division Court. But I mention the above point to show that there is nothing so very shocking or iniquitous in garnishing the clerk of the Division Court. There is no Court in the land where the doctrines of trusts are so well understood or so carefully applied as in the Court of Chancery, and when we find that Court not only approving, but aiding a creditor, to reach his debtor's money, in the hands of the court it should rather unsettle the complacency of those who talk learnedly and impressively of moneys in Court being impressed with a trust, and not being legal debts, &c., &c. It has been urged that asking a clerk to issue a garnishee summons against himself puts the clerk in a dilemma, as he owes a duty to the primary debtor, and should perform his earlier duty first, or, in other words, remit the money before he issues the garnishee summons. The answer to this is evident, for if the garnisher chooses, he may under s. 65 Division Courts Act (see also s. 16 Division Courts 1880) issue the summons from the next adjoining court. I take it that under the above section, that although the word *garnish* is not used, the primary creditor may issue his summons either in the garnishee's own court or in the adjoining court. This is at any rate the effect of Judge's Galt's judgment in *Bland v. Andrews* (not reported). We may, however, hear more of that, as the same case is to be argued before the full bench.

In conclusion, I would submit that reason and principle point strongly to the legality of such a garnishment, and that those whose legal acuteness leads them to different conclusions, must have learned so much law that they have forgotten their common sense and departed from their original purity of reasoning.

P.

Judicature Act—Unlicensed Conveyancers.
To the Editor of THE LAW JOURNAL.

The papers announce that Mr. Mowat intends the ensuing session to again take up his "Judicature Act," which, by the way, may be of value, provided further he adopt the clause so urgently asked for by practitioners outside of Toronto as to doing away with the necessity for court applications in Toronto to the extent now necessary. And why could not Mr Mowat insert a clause or more in aid (and I maintain he is in duty bound to do so) of the profession as against the commonly called "unlicensed conveyancers." The writer feels most grievously the loss of fees, which he is justly entitled to receive. Such persons there are, some four in this place—and I can safely say that either of them does more than the subscriber—and why should this be? Have not the Law Society (Mr. Mowat, a member) promised us impliedly if not directly, that we are entitled to the fees which these others take from us. As a means of trying to kill these writers I am much tempted to advertise I will do conveyancing *without fee*. Were I to do so, no doubt your Journal would write me a homily upon "Etiquette," and yet we are to starve in a degree. Would not something like this work? Every Registrar or Court-officer is to charge for every document which law requires him to receive, or enter double or treble fees, which is not endorsed by a duly licensed practitioner. What is the Law Society for?

S.

—
Chattel Mortgages.

To the Editor of THE CANADA LAW JOURNAL.

There was a reference to the new work of Mr. Barron on *Chattel Mortgages* in your last issue, and the writer can join with you in extolling the many excellences of the learned gentleman's work.

It may not, however, be amiss to point out to the many readers of that work through your Journal one or two slight errors which have crept in and might possibly mislead some of the younger members of the profession.

The author on page 78 intimates that before a creditor can attack a fraudulent con-

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veyance, he must have obtained a judgment on his debt, and quotes a number of cases which were undoubtedly authorities in his favour; but the recent case of the *Reese River Silver Mining Company v. Atwell* L.R. 7 Equity, followed in our own courts in *Longway v. Mitchell*, 17 Grant, 190, holds that a simple contract creditor may file a bill to set aside such a conveyance, though he might have to obtain a judgment on his debt before securing the fruits of his decree.

The author also at page 95 intimates that registration of an assignment of a chattel mortgage is notice to the mortgagor of such arrangement, and cites two American authorities in support of his statement.

The writer has had no opportunity of referring to the decisions in question, but submits that in principle this "is not good law."

It has been held repeatedly that the registration of an assignment of a real estate mortgage is of itself no notice to the mortgagor, and the same reason would equally apply to chattel mortgages.

Also at page 95 the author intimates that "though a purchaser has notice of an encumbrance on chattels, he may purchase them, and will be protected in his purchase if it be in good faith, and the encumbrance be not registered, or there has been no change of possession."

The same question to a certain degree came up in the case of *Morrow v. Hourke*, 39 U.C.Q.B. 500, and as the law then was it was held that a man might acquire goods by Purchase, although aware of a mortgage on them.

In that case the fact was that the chattel was in another county, and the mortgage also had run out, and had not been renewed.

An Act was thereupon passed (40 Vict. cap. 9, sec. 29) (Ont.) applying the word

"in good faith" to purchasers as well as to mortgagees.

The writer, with a good deal of diffidence, submits that if a person be aware that another has a mortgage on or bill of sale of certain goods, he cannot acquire any title in them by purchase or mortgage from the mortgagor, although the mortgage or bill of sale of which he is aware, is not recorded, or is imperfectly recorded; in other words, that as to such goods he cannot be a purchaser or mortgagee in good faith. It is quite otherwise as to creditors. It would seem repugnant to justice that a person should be able to acquire from "A" that which he well knows "A" sold to "B," and hence the writer submits that his view of the law is correct, nor is he aware of any adverse decision.

Yours, &c.,

LEX.

Married Women.

To the Editor of THE LAW JOURNAL.

St Catharines, Nov. 26, 1880.

DEAR SIR,—If the recent case of *Pike v. Fitzgibbon*, L. R. 15 Ch. D. 837—a decision of V.C. Malins—be unreversed, the judgment of our Court of Appeal in *Lawson v. Laidlaw*, is largely affected. The case first referred to decides that a married woman is liable to the extent of her separate estate when the judgment is enrolled or decree entered, no matter when acquired. In *Lawson v. Laidlaw* the court held that only such separate as she had at time of making the contract, and still has, is liable. This certainly extends the rights of creditors very much.

If you think proper, you might allude to this in your next number, as probably a great many of our County Court judges will not be aware of the decision.

Yours, &c.,

BARRISTER.

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Law Society of Upper Canada.

OSGOODE HALL,

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During this Term, the following gentlemen were called to the Degree of Barrister-at-law.

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JAMES ROLAND BROWN.
RICHARD WORNALL WILSON.
JAMES EDWARD LEES.
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ROBERT SINCLAIR GURD.

(The names are placed in the order in which the Candidates entered the Society, and not in the order of merit.)

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ALEXANDER SUTHERLAND.
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And the following gentlemen passed the Preliminary Examinations for Articled Clerks:—

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PETER YOUNG.
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By order of Convocation, the option to take German for the Primary Examination contained in the former Curriculum is continued up to and inclusive of next Michaelmas Term.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

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LAW SOCIETY, TRINITY TERM.

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Ovid, *Fasti*, B. I., vv. 1-300; or,
Virgil, *Æneid*, B. II., vv. 1-317.
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Euclid, Bs. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
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- 1580 { Xenophon, *Anabasis*, B. II.
Homer, *Iliad*, B. IV.
1880 { Cicero, in *Catilinam*, II., III., and IV.
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Ovid, *Fasti*, B. I., vv. 1-300.
1881 { Xenophon, *Anabasis*, B. V.
Homer, *Iliad*, B. IV.
1881 { Cicero, in *Catilinam*, II., III., and IV.
Ovid, *Fasti*, B. I., vv. 1-300.
Virgil, *Æneid*, B. I., vv. 1-304.

Translation from English into Latin Prose.
Paper on Latin Grammar, on which special stress will be laid.

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Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, B. I., II., III.

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Translation from English into French Prose.—
1880.—Souvestre, *Un philosophe sous les toits*.

1881.—Emile de Bonnehose, *Lazare Hoche*.

OR NATURAL PHILOSOPHY.

Books.—Arnett's *Elements of Physics*, 7th edition, and Sommerville's *Physical Geography*.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

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The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Criminal Law, and Books III. & IV. of Broom's Common Law, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

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FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

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2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings, Equity Pleading and Practice in this Province,

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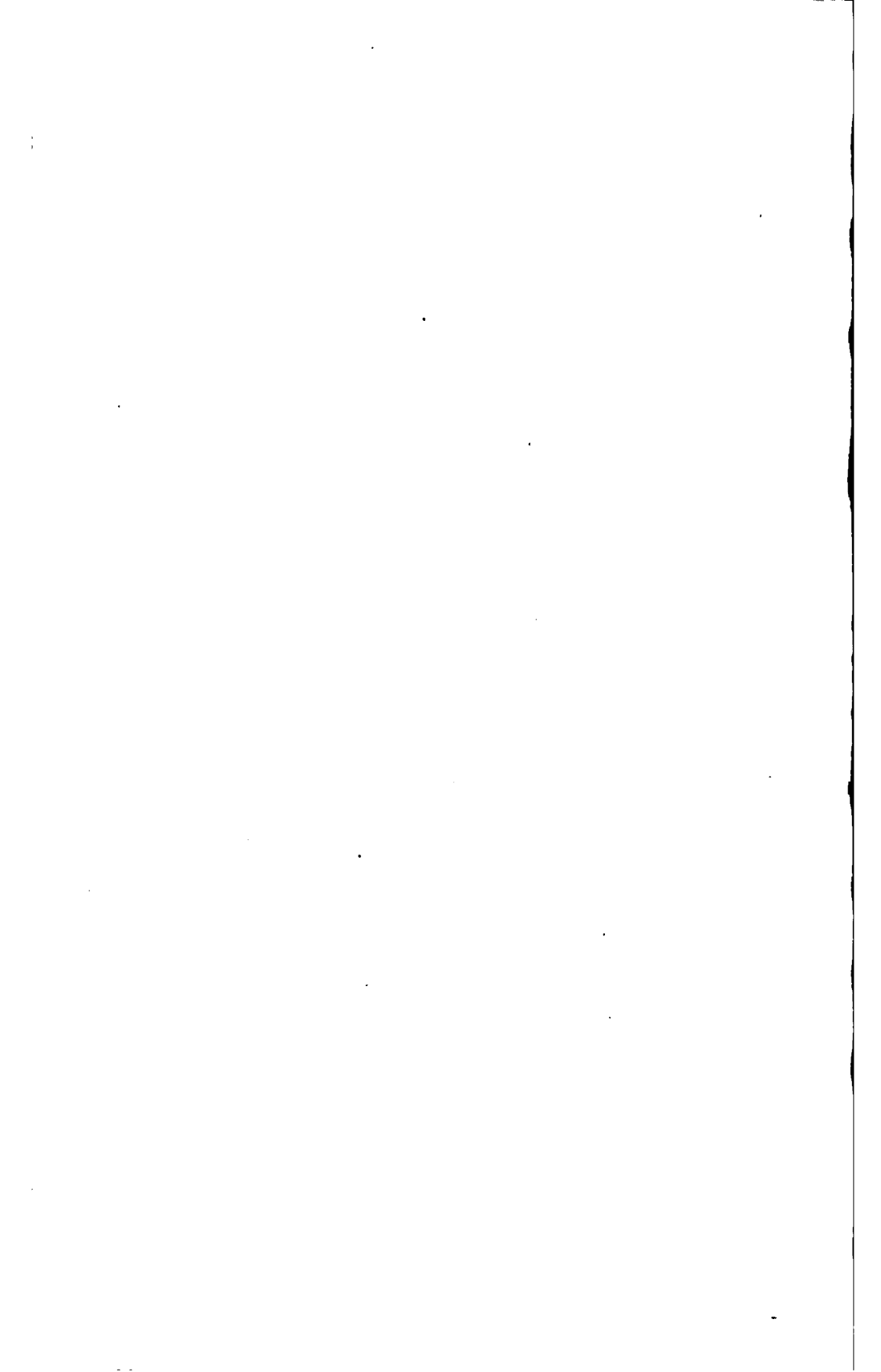
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